RESPONSE TO DRAFT STAFF ANALYSIS

On behalf of City of Newport Beach

Case no. 05-RL-4204-02

Statutes of 1975, Chapter 486; and Statutes of 1984, Chapter 1459

Reconsideration of Prior Decision:
Mandate Reimbursement Process

INTRODUCTION:

Interested Party, City of Newport Beach, submits the following in response to the Draft Staff Analysis issued by Commission staff on February 23, 2006. Two issues were raised in the Draft Staff Analysis: jurisdiction and effective date of the decision and whether the statutes in question give rise to costs mandated by the state within the meaning of California Constitution, article XIII B, section 6. Staff's conclusions with regard to the second issue were based on improper reasoning. City of Newport Beach wishes to incorporate and elaborate upon its opening brief to set the record straight.

Do the test claim statutes impose "costs mandated by the state" on local agencies or school districts within the meaning of article XIII B, section 6, and the Government Code sections 17514 and 17556?

Staff answers the above question in the negative concluding that there is no reimbursable state mandate. Staff arrives at this erroneous conclusion through misapplication of law and failing to follow a recent directive set forth by the California Supreme Court.

Background

In 1986, this Commission issued its Statement of Decision in the Claim of Fresno County regarding the Mandate Reimbursement Process (MRP) test claim finding that the program was, in fact, a reimbursable state mandate. (Administrative Record (AR) at 161-163.) At the time of the hearing, however, the Department of Finance and the State Controller's Office were strenuously arguing that the program was not a state mandate. (AR at 33-130.) Indeed, the staff analysis recommended finding against the mandate. (AR at 15-20.) The reasons proffered against the finding of a mandate were: the test claim legislation was too old and thus outside the jurisdiction of the Commission,

participation in the program was voluntary, and the program was part of a voter initiative and foreclosed from being considered a state mandate. The test claimant argued successfully that the program was not outside the jurisdiction of the Commission, was mandatory and furthered the intent of the voters. Unfortunately, the record does not give a clear explanation as to why the Commission found as it did. (AR at 131-132.)

Today, this Commission, in its reconsideration, is facing the same question, the same opposition, and the same recommendation from its staff which begs the question: What has changed that would support a change of the Commission's initial finding?

Analysis

1. Staff's Reliance on Section 17556 is Misplaced.

Staff relies on Government Code section 17556, subdivision (f), to support a finding that MRP is "necessary to implement, or reasonably within the scope of... a ballot measure approved by the voters in a statewide or local election." Although the statute appears facially valid,[1] the application by Staff to this test claim raises constitutional issues and flies in the face of a recent Supreme Court decision.

A. Staff Fails to Follow Guidelines Set Forth by the California Supreme Court

Inexplicably, Staff fails to follow the recent guidelines given by the California Supreme Court in *San Diego Unified School District v. Commission on State Mandates.*[2] In that case, the Court provided the following direction:

> The District and amici curiae on its behalf (consistently with the opinion of the Court of Appeal below) argue that the holding of *City of Merced, supra,* 153 Cal.App.3d 777, should not be extended to apply to situations beyond the context presented in that case and in *Kern High School Dist., supra,* 30 Cal.4th 727. The District and amici curiae note that although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program.
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> Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section

[1] City of Newport Beach does not concede whether Government Code section 17556 is a valid statute so as to preserve its rights and the rights of similarly situated interested parties on appeal.

[2] (2004) 33 Cal.4th 859; [16 Cal.Rptr.3d 466].

> 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley, supra*, 190 Cal.App.3d 521, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ — and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra*, 153 Cal.App.3d 777, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.[3]

Clearly, the Court is cautioning those who would apply *City of Merced*[4] without regard to the end result. Staff might argue that this caution applies only to the application of *City of Merced*. Such argument, however, would be unfounded. The Court cited application of *City of Merced* merely as an example. The essence of the direction from the Court is: Look to the intention of the Legislature and the voters to before applying a rule of law to ensure that that intent is not thwarted.

In the instant case, the intent of the voters is clearly set forth in the administrative record (AR at 51-53.), and explained in detail in the Opening Brief of City of Newport Beach (Opening Brief at 3-7.) and the Comments filed by Grant Joint Union High School District (Comments at 2-8.)

The Commission, in 1986, understood the intent of the voters and acted to ensure that that intent guided its decision on the test claim. Since then, the California Supreme Court

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[3] *Id.* at 485-486.

[4] 16 Cal.Rptr.3d at 486.

has directed the Commission to look to the intent of the voters before acting in a manner that produces absurd results in light of that intent. The Commission today can do no less.

B. Staff's Proposed Application of Section 17556 Impermissibly Interferes With Constitutionally Guaranteed Rights.

Staff asserts that the Commission should rely on Government Code section 17556, subdivision (f), to defeat the prior finding of the existence of a reimbursable state mandate. Such application of this statute, however, raises serious constitutional issues.

The California Constitution, article XIII B, section 6, guarantees that "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service...." This constitutional right held by local government is no less important that the other rights guaranteed to individual citizens by the California and United States Constitutions. Indeed, this section was added by the voters because such protection of local government is a benefit to the citizens of the state. Ensuring that the state pays its own way through reimbursement of the costs associated with state-mandated programs, brings economic stability and the continued provision of local governmental programs. Although constitutional rights can be subject to certain limiting factors[5], such limiting factors cannot go too far thus obfuscating the essence of the right itself.[6]

Not only does staff's proposed application of section 17556, subdivision (f), impermissibly limit local government's constitutional right to reimbursement, it also interferes with local government contracts for the provision of services attendant to MRP. At the time of contract, the local governmental entities relied upon the long-established reimbursement of program costs to seek services of contractors and/or to employ staff to comply with the ever-growing complexity of MRP. Such encroachment into contract rights is barred by the Contracts Clause of the U.S. Constitution.[7]

Moreover, staff's proposed application of section 17556, subdivision (f), violates the Due Process clause of the Fourteenth Amendment of the U.S. Constitution. Substantive Due Process as guaranteed by the Fourteenth Amendment ensures fundamental fairness in the creation and application of state statutes.[8] The action proposed by Staff will result in an impermissible limitation of a constitutionally-guaranteed right. A limitation that flies in

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[5] See, *Ohio v. Akron Center for Reproductive Health* (1990) 497 U.S. 502, [110 S.Ct. 2972]. Attached as Exhibit A.

[6] See, *Nollan et ux. v. California Coastal Commission* (1987) 483 U.S. 825, [107 S.Ct. 3141]. Attached as Exhibit B.

[7] See, *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, [98 S. Ct. 2716]. Attached as Exhibit C.

[8] See, *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, [57 S.Ct. 578]. Attached as Exhibit D.

the face of voter intent in establishing this right thus robbing the voters of the financial security they had sought to create.

C. Reconsideration of Prior Test Claims is Barred by the Doctrine of Res Judicata.

The Legislature acting through A.B. 138 seeks to interject itself into the Commission process well after the process has resolved an issue. In this case, the Legislature calls on the Commission to reconsider its decision in MRP in light of subsequent federal or state statutory or case law. Nowhere does the Government Code or the Code of Regulations permit or envision such an action. And in so doing, the Legislature circumvents the law and does what no party to the test claim can do — cause a review of a decision two decades later.

In *Carmel Valley Fire Protection District v. State of California*,[9] the court addressed a similar situation. The decision in 1979 by the Commission's predecessor, the Board of Control, was not challenged. During a writ proceeding, begun in 1984, the state sought to challenge the Board's decision. The appellate court held that the state was collaterally estopped from attacking the prior determination by the Board.[10] The doctrine of *res judicata*, a shortened version of *res judicata pro veritate accipitur*, (claim preclusion) is the "[r]ule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to subsequent action involving the same claim, demand or cause of action."[11] The related doctrine of collateral estoppel (issue preclusion) limits the application of the doctrine of *res judicata* to a single issue determined in a prior judgment barring relitigation by parties to the prior action or their privies.[12] The *Carmel Valley* court applied the doctrine of administrative collateral estoppel and found that the elements as set forth in *People v. Sims*[13] were present, that is, the administrative agency acted in a judicial capacity, the agency had properly resolved the dispute before it and all parties had the opportunity to be heard and to fully and fairly litigate the claims.[14] The state had countered the application of this doctrine by arguing that it was not in privity with the state department that had appeared in the prior adjudication. The court was not so inclined to agree concluding that "agents of the same government are in privity with each other, since they represent not their own rights but the right of the government."[15]

So, too, the doctrine can be applied in this purported reconsideration. The Legislature had its opportunity to be heard at the original hearing in 1986. And, in fact, the record

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[9] (1987) 190 Cal.App.3d 521, [234 Cal.Rptr. 795].
[10] *Id.* at 534.
[11] Black's Law Dictionary, Fifth ed.
[12] *Id.*
[13] (1982) 32 Cal.3d 468, 479, [186 Cal.Rptr. 77]. Attached as Exhibit E.
[14] 190 Cal.App.3d at 535.
[15] *Id.* citing *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, [29 Cal.Rptr. 657].

clearly shows that both the Department of Finance and the State Controller's Office filed their arguments, arguments that were later echoed in the staff's analysis, as to why MRP should not be found to be a state-mandated program. Once the decision was made by the Commission, however, the proper challenge was through the courts via a writ. No such writ was forthcoming and the decision remained set in stone for almost twenty years. Now, the Legislature feeling the squeeze of having passed too many unfunded mandates seeks to alter the long-standing decision by alleging there may be a change in the law. As clearly demonstrated above, the only change in the law supports the original decision. This reconsideration should be denied outright. As the old saying goes: You only get one bite of the apple — even if you are the state of California.

CONCLUSION:

Based on the preceding arguments, City of Newport Beach urges the Commission to again honor the intent of the voters, reaffirm the Commission's original decision as there has been no change in law upon which to reverse it, and find that MRP is a reimbursable state mandate under Article XIII B, section 6 of the California Constitution.

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and correct, except as to those matters stated upon information and belief and as to those matters, I believe them to be true.

Executed this 15 day of March, 2005, at Newport Beach, California, by:

Glen Everroad
Revenue Manager
City of Newport Beach

EXHIBIT A

LEXSEE 497 US 502

OHIO v. AKRON CENTER FOR REPRODUCTIVE HEALTH ET AL.

No. 88-805

SUPREME COURT OF THE UNITED STATES

497 U.S. 502; 110 S. Ct. 2972; 111 L. Ed. 2d 405; 1990 U.S. LEXIS 3302; 58 U.S.L.W. 4979

November 29, 1989, Argued
June 25, 1990, Decided

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

DISPOSITION: *854 F. 2d 852,* reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant sought review of the judgment of the United States Court of Appeals for the Sixth Circuit holding appellant's statute requiring parental notice and consent prior to an abortion invalid.

OVERVIEW: Appellant state enacted a statute requiring parental notice and consent prior to a minor's abortion, and provided a bypass procedure for that requirement. Appellees, health care providers and a pregnant minor, challenged the constitutionality of the statute. The lower court's ruling that the statute was unconstitutional was affirmed. On further appeal, the Court reversed, holding that the bypass procedures met the four criteria that must be satisfied in a consent statute. Minor was allowed to show that she possessed the maturity and information to make the decision, that the procedure was in her best interests, anonymity was guaranteed, and the bypass procedure was expeditious. Appellant was allowed to require the criteria to be proven by clear and convincing evidence. Minors were assisted by an attorney and guardian ad litem in the pleadings and procedures. A minor's physician's requirement to notify one of the minor's parents was upheld based precedential considerations.

OUTCOME: The Court reversed, holding that the statute did not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion. The four criteria to satisfy a consent statute were present, and the clear and convincing evidence required did not place an undue on appellees.

LexisNexis(R) Headnotes

Family Law > Parental Duties & Rights > Parental Consent
Constitutional Law > Substantive Due Process > Privacy

[HN1] In order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a state must provide some sort of bypass procedure if it elects to require parental consent. A bypass procedure that suffices for a consent statute will suffice also for a notice statute.

Family Law > Parental Duties & Rights > Parental Consent
Constitutional Law > Substantive Due Process > Privacy

[HN2] There are four criteria that a bypass procedure in a consent statute must satisfy. First, the procedure must allow the minor to show that she possesses the maturity and information to make an abortion decision, in consultation with her physician, without regard to her parents' wishes. Second, the procedure must allow the minor to show that, even if she cannot make the abortion decision by herself, the desired abortion would be in her best interests. Third, the procedure must insure the minor's anonymity. Fourth, courts must conduct a bypass procedure with expedition to allow the minor an effective opportunity to obtain an abortion.

Family Law > Parental Duties & Rights > Parental Consent
Constitutional Law > Substantive Due Process > Privacy
[HN3] See *Ohio Rev. Code Ann. § 2151.85(F).*

Governments > Legislation > Interpretation
[HN4] Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.

Governments > Legislation > Interpretation
Governments > Legislation > Effect & Operation
[HN5] When appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the act would be valid.

Family Law > Parental Duties & Rights > Parental Consent
Constitutional Law > Substantive Due Process > Privacy
[HN6] A state may require a minor to prove maturity or best interests in a bypass procedure. A state, moreover, may require a heightened standard of proof when the bypass procedure contemplates an ex parte proceeding at which no one opposes the minor's testimony.

Evidence > Procedural Considerations > Inferences & Presumptions
[HN7] Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.

DECISION:

Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction.

SUMMARY:

In November 1985, the Ohio legislature enacted a statute which made it a criminal offense for a physician or other person to perform an abortion on an unmarried, unemancipated minor under the age of 18, except under four circumstances. Pursuant to the statute, a physician could perform an abortion on such a minor where either (1) the physician provided at least 24 hours' actual notice of his intention to perform the abortion, in person or by telephone, to (a) one of the minor's parents or her guardian or custodian, or (b) the minor's adult brother, sister, stepparent, or grandparent, if the minor and the other relative each filed an affidavit in the juvenile court stating that the minor feared physical, sexual, or severe emotional abuse from one of her parents--provided that a physician who could not give actual notice after a reasonable effort could perform the abortion after at least 48 hours' constructive notice by both ordinary and certified mail; (2) the minor's parent, guardian, or custodian consented to the abortion in writing; (3) a juvenile court issued an order authorizing the minor to consent--thus bypassing parental notice or consent--after (a) the minor filed a complaint stating that she was pregnant, unmarried, unemancipated, and under 18 years of age, that she desired to have an abortion without notifying one of her parents, and that either (i) she had sufficient maturity and information to make an intelligent decision whether to have an abortion without notice, (ii) one of her parents had engaged in a pattern of physical, sexual, or emotional abuse against her, or (iii) notice was not in her best interests, (b) a guardian ad litem and an attorney were appointed to represent the minor if she had not retained her own counsel, and (c) the minor proved her allegation of maturity, pattern of abuse, or best interests by clear and convincing evidence at a hearing which the court conducted while preserving the anonymity of the complainant and keeping all papers confidential; or (4) judicial inaction provided constructive authorization for the minor to consent, where either (a) the juvenile court failed (i) to hold its hearing within 5 "business day[s]" after the minor filed her complaint, (ii) to render its decision immediately after the conclusion of the hearing, or (iii) to deliver the notice of appeal and record to a state appellate court (the Ohio Court of Appeals) within 4 "days" after the minor filed a notice of appeal, or (b) the appellate court failed (i) to docket the appeal upon receipt of the notice of appeal and record, or (ii) to issue a decision within 5 "days" after the docketing. With respect to the judicial bypass procedure, the statutory scheme further provided that (1) the minor had to choose among three pleading forms prescribed by the Supreme Court of Ohio--one of which alleged her maturity only, the second of which alleged her best interests only, and the third of which alleged both her maturity and her best interests; and (2) the minor had to supply the name of one of her parents on the complaint form and, if not represented by counsel, sign the form. In March 1986, days before the effective date of the statute, an action was brought against Ohio in the United States District Court for the Northern District of Ohio, in which action the statute's constitutionality was challenged by an Akron, Ohio facility which provided abortions, a physician who

performed abortions at the facility, and an unmarried, unemancipated minor woman who sought an abortion at the facility. The District Court issued an order permanently enjoining the enforcement of the statute *(633 F Supp 1123)*. On appeal, the United States Court of Appeals for the Sixth Circuit, affirming, expressed the view that the statute was constitutionally defective with respect to (1) the expedition of the judicial bypass procedure, (2) the guarantee of the minor's anonymity, (3) the constructive authorization provisions, (4) the clear and convincing evidence standard, (5) the pleading form requirements, and (6) the physician's obligation to give notice to one of the minor's parents *(854 F2d 852)*.

On appeal, the United States Supreme Court reversed. In an opinion by Kennedy, J., joined in pertinent part by Rehnquist, Ch. J., and White, Stevens, O'Connor, and Scalia, JJ., it was held that (1) the statute's judicial bypass procedure satisfied the requirements of due process under the Federal Constitution's Fourteenth Amendment; (2) the provisions dealing with the expedition of the judicial bypass, the minor's anonymity, constructive authorization, the clear and convincing evidence standard, and the pleading requirements all facially comported with the due process clause; (3) assuming that the statute gave a pregnant minor the right to avoid unnecessary or hostile parental involvement if she could demonstrate, in the judicial bypass procedure, that her maturity or best interests favored authorizing her to consent to an abortion without notifying one of her parents, the bypass procedure was not made unfair, and the minor was not deprived of such right without due process, by (a) the pleading requirements, (b) the alleged lack of expedition and lack of anonymity for the minor, and (c) the clear and convincing evidence standard; and (4) the requirement that the physician give parental notice was not unconstitutional.

Scalia, J., concurring, joined the court's opinion, and also expressed the view that (1) the Federal Constitution contained no right to abortion, (2) it was both legally correct and pragmatic to leave the matter of the right to abortion to the political process, and (3) the Supreme Court should end its disruptive intrusion into this field as soon as possible.

Stevens, J., concurring in part and concurring in the judgment, expressed the view that (1) while the judicial bypass provided by the statute might be so obviously inadequate in exceptional situations--such as where notice (a) would cause a realistic risk of physical harm to the pregnant woman, (b) would cause trauma to an ill parent, or (c) would enable the parent to prevent the abortion for reasons that were unrelated to the best interests of the minor--such conclusion should not be reached before the statute has been implemented and the significance of its restrictions evaluated in the light of its administration; (2) the statute, on its face, provided a sufficient procedure for cases in which the minor was mature or parental notice would not be in her best interests; and (3) the requirement that the physician give parental notice was not unconstitutional on its face, since (a) the statute required that the physician take reasonable steps to notify a minor's parent, and (b) such notification might contribute to the decisionmaking process.

Blackmun, J., joined by Brennan and Marshall, JJ., dissenting, expressed the view that (1) in enacting the statute, Ohio (a) created a tortuous maze rather than a judicial bypass system that reflected the sensitivity necessary when dealing with a minor making the abortion decision, and (b) utterly failed to show that it had any significant interest in deliberately placing its pattern of obstacles in the path of the minor who sought to exercise her constitutional right to terminate a pregnancy; (2) the statutory provisions dealing with the expedition of the judicial bypass, the minor's anonymity, constructive authorization, the clear and convincing evidence standard, and the pleading requirements singly and collectively crossed the limit of constitutional acceptance; and (3) even if the judicial bypass procedure was itself constitutional, the statute was nevertheless unconstitutional because it required a physician's personal and nondelegable obligation to give the required statutory notice.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]
ABORTION § 8
CONSTITUTIONAL LAW § 526
due process -- minors -- parental consent -- judicial bypass procedure --
Headnote:[1A][1B][1C][1D]

A state statute's judicial bypass procedure for an unmarried, unemancipated minor who seeks to obtain an abortion without parental notice or parental consent satisfies the requirements of due process under the Federal Constitution's Fourteenth Amendment, where such procedure (1) permits the minor to show that she is sufficiently mature and well enough informed to decide intelligently whether to have an abortion; (2) requires a juvenile court to authorize the minor's consent where the court determines that the abortion is in the minor's best interests and in cases where the minor has shown a pattern of physical, sexual, or emotional abuse; (3) assures the minor's anonymity by providing that (a) the juvenile court shall not notify the minor's parents that she is pregnant or that she wants to have an abortion, and (b) the juvenile court and a state appellate court must maintain the confidentiality of the complaint and all other papers as nonpublic records, which records state employees are prohibited from disclosing under state criminal statutes; and (4) requires

(a) the juvenile court to make its decision within 5 "business day[s]" after the minor files her complaint, (b) the appellate court to docket an appeal within 4 "days" after the minor files a notice of appeal, and (c) the appellate court to render a decision within 5 "days" after docketing the appeal. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[***LEdHN2]
ABORTION § 8
CONSTITUTIONAL LAW § 526
due process -- minors -- judicial bypass procedure -- confidentiality of complaint --
Headnote:[2A][2B][2C]

With respect to the right of an unmarried, unemancipated minor to obtain an abortion through a judicial bypass procedure without notifying one of her parents, the dictates of minimal due process, under the Federal Constitution's Fourteenth Amendment, are satisfied on the face of a state statutory provision which requires a minor seeking court authorization to (1) sign a complaint form unless she has counsel, and (2) supply the name of one of her parents at four different places on the complaint form even if she has counsel; in such context, the distinction between confidentiality and anonymity does not have constitutional significance, and complete anonymity is not critical. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[***LEdHN3]
ABORTION § 8
CONSTITUTIONAL LAW § 526
due process -- minors -- judicial bypass -- expedition of procedure --
Headnote:[3A][3B][3C]

With respect to the right of an unmarried, unemancipated minor to obtain an abortion through a judicial bypass procedure without notifying one of her parents, the dictates of minimal due process, under the Federal Constitution's Fourteenth Amendment, are satisfied on the face of a state statutory provision which requires that (1) the juvenile court make its decision within 5 "business day[s]" after the minor files her complaint, and (2) a state appellate court docket a minor's appeal within 4 "days" after the minor files a notice of appeal, and render a decision within 5 "days" after docketing; even assuming that such judicial bypass procedure could take up to 22 days based upon a calculation which interpreted the term "days" as business days, the mere possibility of such occurrence in a rare case is insufficient to invalidate the procedure. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[***LEdHN4]
ABORTION § 8
CONSTITUTIONAL LAW § 526
due process -- minors -- judicial bypass procedure -- constructive authorization --
Headnote:[4A][4B][4C]

A state statutory provision which constructively authorizes an unmarried, unemancipated minor to consent to an abortion without notifying one of her parents--if either (1) the juvenile court fails to hold its hearing within 5 "business day[s]" after the minor files her complaint, (2) a state appellate court fails to docket an appeal within 4 "days" after the minor files a notice of appeal, or (3) the appellate court fails to render a decision within 5 "days" after docketing the appeal--comports on its face with the due process clause of the Federal Constitution's Fourteenth Amendment, notwithstanding the absence of an affirmative court order; such statute, in providing definite and reasonable deadlines, is constitutional where there is no showing that the time limitations which it imposes will be ignored, since a state may expect that its judges will follow mandated procedural requirements absent a demonstrated pattern of abuse or defiance. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[***LEdHN5]
ABORTION § 8
CONSTITUTIONAL LAW § 526
due process -- minors -- judicial bypass procedure -- clear and convincing evidence --
Headnote:[5A][5B][5C]

A state statutory provision which authorizes a minor to consent to an abortion without notifying one of her parents--if a juvenile court finds that the minor has proven in an ex parte proceeding, by clear and convincing evidence, that either (1) she has sufficient maturity and information to make an intelligent decision whether to have an abortion without notice, (2) one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her, or (3) notice is not in her best interests--does not deprive a minor of her liberty interest in obtaining an abortion, under the due process clause of the Federal Constitution's Fourteenth Amendment, by imposing a heightened standard of proof upon the minor, where the minor is assisted by an attorney and a guardian ad litem; the state does not have to bear the burden of proof on the issues of the minor's maturity or best interests, insofar as the clear and convincing evidence standard insures that the judge will take special care in deciding whether the minor's consent to abortion should proceed without parental notification. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[***LEdHN6]
ABORTION § 8
CONSTITUTIONAL LAW § 526
due process -- minors -- judicial bypass procedure -- pleading forms -- maturity -- best interests --
Headnote:[6A][6B][6C]

An unmarried, unemancipated minor who seeks to obtain an abortion is not deprived of her right, under the due process clause of the Federal Constitution's Fourteenth Amendment, to prove either that she has sufficient maturity and information to make an intelligent decision whether to have an abortion, or that parental notice would not be in her best interests, by a state statute generally prohibiting any person from performing an abortion on such a minor absent notice to one of the minor's parents, but allowing a juvenile court to authorize the minor's consent, where the minor has to choose among three pleading forms--one of which alleges her maturity only, the second of which alleges her best interests only, and the third of which alleges both her maturity and her best interests; even assuming that such pleading scheme could produce some initial confusion because few minors would have counsel when pleading, such procedure is simple and straightforward, does not deprive the minor of an opportunity to prove her case, and thus, on its face, satisfies the dictates of minimal due process, where (1) it seems unlikely that the state courts would treat a minor's choice of complaint form without due care and understanding for her unrepresented status, and (2) the minor does not make a binding election by the initial choice of pleading form and can move for leave to amend the pleadings upon receiving appointed counsel after filing the complaint. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[***LEdHN7]
ABORTION § 8
CONSTITUTIONAL LAW § 526
due process -- judicial bypass procedure -- avoidance of parental involvement --
Headnote:[7A][7B]

Assuming that a state statute gives a pregnant minor the right to avoid unnecessary or hostile parental involvement if she can demonstrate, in a judicial bypass procedure, that her maturity or best interests favor authorizing her to consent to an abortion without notifying one of her parents, the bypass procedure is not made unfair, and the minor is not deprived of such right without due process, by (1) a requirement that the minor choose among three pleading forms, where one form alleges her maturity only, another alleges her best interests only, and a third alleges both her maturity and her best interests; (2) requirements that (a) the juvenile court make its decision within 5 "business day[s]" after the minor files her complaint, and (b) a state appellate court docket a minor's appeal within 4 "days" after the minor files a notice of appeal and render a decision within 5 "days" after docketing; (3) requirements that the minor (a) sign her complaint form unless she has counsel, and (b) supply the name of one of her parents at four different places on the form even if she has counsel; and (4) a requirement that the minor prove, by clear and convincing evidence, that either (1) she has sufficient maturity and information to make an intelligent decision whether to have an abortion without notice, or (2) notice is not in her best interests due to parental abuse or other reasons. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[***LEdHN8]
ABORTION § 9
notification of minor's parent by physician -- constructive notice --
Headnote:[8A][8B]

A provision of a state statute that, with certain exceptions, prohibits any person from performing an abortion on an unmarried, unemancipated minor absent notice to one of the minor's parents or a juvenile court order authorizing the minor to consent--which provision allows a physician to perform an abortion on such a minor where either (1) the physician provides at least 24 hours' actual notice of his intention to perform the abortion, in person or by telephone, to (a) one of the minor's parents or her guardian or custodian, or (b) the minor's adult brother, sister, stepparent, or grandparent, if the minor and the other relative each file an affidavit in the juvenile court stating that the minor fears physical, sexual, or severe emotional abuse from one of her parents, or (2) a physician who cannot give actual notice after a reasonable effort provides at least 48 hours' constructive notice by both ordinary and certified mail--does not render the statute unconstitutional, under the Federal Constitution, insofar as such provision requires that notice be given by the physician, rather than by some other qualified person; a state may constitutionally require a physician to take reasonable steps to notify the parent of a minor seeking an abortion, because (1) the parent often will provide important medical data to the physician, (2) a conversation with the physician may enable the parent to provide better advice to the minor, and (3) access to an experienced and--in an ideal case--detached physician who can assist the parent in approaching the problem in a mature and balanced way may benefit both the parent and the child in a manner not possible through notice by less qualified persons; furthermore, any imposition which such provision makes on the physician's schedule is unobjectionable in light of the provision's allowance for

notice by mail and for the forgoing of notice in the event of certain emergencies. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[***LEdHN9]
ABORTION § 8
parental consent -- bypass procedure --
Headnote:[9]

In order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a state must, under the Federal Constitution, provide some sort of bypass procedure if it elects to require parental consent.

[***LEdHN10]
ABORTION § 8
parental consent -- notice --
Headnote:[10]

It is a corollary to the greater intrusiveness of statutes which require parental consent for a minor's abortion that a bypass procedure that will suffice, under the Federal Constitution, for a consent statute will suffice for a parental notice statute also.

[***LEdHN11]
EVIDENCE § 99
STATUTES § 107
avoidance of unconstitutionality --
Headnote:[11]

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality; parties making a facial challenge to a statute must show that no set of circumstances exists under which the statute would be valid.

SYLLABUS: As enacted, Ohio's Amended Substitute House Bill 319 (H. B. 319) makes it a crime for a physician or other person to perform an abortion on an unmarried, unemancipated, minor woman, unless, *inter alia*, the physician provides timely notice to one of the minor's parents or a juvenile court issues an order authorizing the minor to consent. To obtain a judicial bypass of the notice requirement, the minor must present clear and convincing proof that she has sufficient maturity and information to make the abortion decision herself, that one of her parents has engaged in a pattern of physical, emotional, or sexual abuse against her, or that notice is not in her best interests. Among other things, H. B. 319 also allows the physician to give constructive notice if actual notice to the parent proves impossible "after a reasonable effort"; requires the minor to file a bypass complaint in the juvenile court on prescribed forms; requires that court to appoint a guardian ad litem and an attorney for the minor if she has not retained counsel; mandates expedited bypass hearings and decisions in that court and expedited review by a court of appeals; provides constructive authorization for the minor to consent to the abortion if either court fails to act in a timely fashion; and specifies that both courts must maintain the minor's anonymity and the confidentiality of all papers. Shortly before H. B. 319's effective date, appellees -- an abortion facility, one of its doctors, and an unmarried, unemancipated, minor woman seeking an abortion there -- and others filed a facial challenge to the statute's constitutionality in the Federal District Court, which ultimately issued an injunction preventing H. B. 319's enforcement. The Court of Appeals affirmed, concluding that various of the statute's provisions were constitutionally defective.

Held: The judgment is reversed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II, III, and IV, concluding that, on its face, H. B. 319 does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion. Pp. 510-519.

1. House Bill 319 accords with this Court's cases addressing the constitutionality of parental notice or consent statutes in the abortion context. *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 49 L. Ed. 2d 788, 96 S. Ct. 2831; Bellotti v. Baird, 443 U.S. 622, 61 L. Ed. 2d 797, 99 S. Ct. 3035; H. L. v. Matheson, 450 U.S. 398, 67 L. Ed. 2d 388, 101 S. Ct. 1164; Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517; Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481.* Pp. 510-517.

(a) Whether or not the Fourteenth Amendment requires parental notice statutes, as opposed to parental consent statutes, to contain judicial bypass procedures, H. B. 319's bypass procedure is sufficient because it meets the requirements identified in *Danforth, Bellotti, Ashcroft*, and *Akron* for the more intrusive consent statutes, particularly the four criteria set forth by the principal opinion in *Bellotti, 443 U.S. at 643-644* (opinion of Powell, J.). First, the statute satisfies the requirement that the minor be allowed to show the maturity to make her abortion decision without regard to her parents' wishes. Second, by requiring the juvenile court to authorize her consent upon determining that the abortion is in her best interests and in cases where she has shown a pattern of abuse, H. B. 319 satisfies the requirement that she be allowed to show that, even if she cannot make the decision by herself, the abortion would be in her best interests. Third, the requirement that a bypass procedure en-

sure the minor's anonymity is satisfied, since H. B. 319 prohibits the juvenile court from notifying the parents that the complainant is pregnant and wants an abortion and requires both state courts to preserve her anonymity and the confidentiality of court papers, and since state law makes it a crime for any state employee to disclose documents not designated as public records. Neither the mere possibility of unauthorized, illegal disclosure by state employees nor the fact that the H. B. 319 complaint forms require the minor to provide identifying information for administrative purposes is dispositive. Complete anonymity is not critical under this Court's decisions, and H. B. 319 takes reasonable steps to prevent the public from learning of the minor's identity. Fourth, H. B. 319's time limits on judicial action satisfy the requirement that a bypass procedure be conducted with expedition. Even if, as appellees contend, the bypass procedure could take up to 22 calendar days, including weekends and legal holidays, that possibility does not suffice to invalidate the statute on its face. See, *e. g., Ashcroft, 462 U.S. at 477, n.4, 491, n.16.* Pp. 510-514.

(b) The *Bellotti* criteria need not be extended by imposing appellees' suggested additional requirements on bypass procedures. First, H. B. 319 is not rendered unconstitutional by the fact that its constructive authorization provisions do not require an affirmative order authorizing the physician to act in the event that either state court fails to act within the prescribed time limits. Absent a showing that those limits will be ignored, the State may expect that its judges will follow mandated procedural requirements. Moreover, *Ashcroft, supra, at 479-480, n.4,* does not require constructive authorization provisions, which were added by Ohio out of an abundance of caution and concern for the minor's interests. Second, a bypass procedure such as Ohio's does not violate due process by placing the burden of proof on the issues of maturity or best interests on the minor or by requiring a heightened, clear and convincing evidence standard of proof. Justice Powell in *Bellotti, 443 U.S. at 634,* indicated that a State may require the minor to bear the burden of proof on these issues. Moreover, a State may require a heightened standard of proof when, as here, the bypass procedure contemplates an *ex parte* proceeding at which no one opposes the minor's testimony and she is assisted by an attorney and a guardian ad litem. Third, H. B. 319's statutory scheme and the bypass complaint forms do not deny an unwary and unrepresented minor the opportunity to prove her case by requiring her to choose among three forms, the first of which relates only to maturity, the second to best interests, and the third to both. Even assuming some initial confusion, it is unlikely that the Ohio courts will treat a minor's choice of forms without due care and understanding for her unrepresented status. Moreover, she does not make a binding election by her initial form choice, since H. B. 319 provides her with appointed counsel after filing the complaint and allows her to move to amend the pleadings. Pp. 514-517.

2. Even assuming that H. B. 319 gives a minor a substantive, state-law liberty or property right "to avoid unnecessary or hostile parental involvement" upon proof of maturity or best interests, the statute does not deprive her of this right without due process, since its confidentiality provisions, expedited procedures, pleading form requirements, clear and convincing evidence standard, and constructive authorization provisions are valid on their face. Pp. 517-518.

3. House Bill 319 is not facially invalid simply because it requires parental notice to be given by the physician rather than by some other qualified person. Since the physician has a superior ability to garner and use important medical and psychological data supplied by a parent upon receiving notice, a State may require the physician himself to take reasonable steps to notify the parent. See *Matheson, 450 U.S. at 400, 411.* In addition, the conversation with an experienced and detached physician may assist the parent in approaching the problem in a mature and balanced way and thereby enable him to provide better advice to the minor than would a conversation with a less experienced person. Any imposition on the physician's schedule is diminished by provisions allowing him to give notice by mail if he cannot reach the parent "after a reasonable effort" and to forgo notice in the event of certain emergencies, which provisions constitute an adequate recognition of his professional status. *Akron, 462 U.S. at 446-449,* distinguished. Pp. 518-519.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA, concluded in Part V that H. B. 319 constitutes a rational way to further legitimate ends. A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronting a woman considering an abortion, which decision will affect her own destiny and dignity and the origins of the other human life within the embryo. It is both rational and fair for the State to conclude that, in most instances, the beginnings of that understanding will be within the family, which will strive to give a lonely or even terrified minor advice that is both compassionate and mature. Pp. 519-520.

JUSTICE STEVENS, agreeing that H. B. 319 is not unconstitutional on its face, concluded that, in some of its applications, the one-parent notice requirement will not reasonably further the State's legitimate interest in protecting the welfare of its minor citizens. The question

whether the judicial bypass is so obviously inadequate for such exceptional situations that the entire statute should be invalidated must await the statute's implementation and the evaluation of the significance of its restrictions in light of its administration. The State must provide an adequate mechanism for avoiding parental notification for cases in which the minor is mature or notice would not be in her best interests. See *Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 441, 103 S. Ct. 2481, 76 L. Ed. 2d 687 n.31.* Pp. 521-523.

COUNSEL: Rita S. Eppler, Assistant Attorney General of Ohio, argued the cause for appellant. With her on the briefs were Anthony J. Celebrezze, Jr., Attorney General, and Thomas J. O'Connell and Suzanne E. Mohr, Assistant Attorneys General.

Linda R. Sogg argued the cause for appellees. With her on the brief were Dara Klassel, Roger Evans, Barbara E. Otten, and Eve W. Paul. *

> * Briefs of amici curiae urging reversal were filed for American Family Association, Inc., by Peggy M. Coleman; for the Association of American Physicians and Surgeons by Ann-Louise Lohr, Paige Comstock Cunningham, and Kent Masterson Brown; for Concerned Women for America by Jordan W. Lorence, Cimron Campbell, and Wendell R. Bird; for the Knights of Columbus by Brendan V. Sullivan, Jr., Kevin J. Hasson, and Carl A. Anderson; for the United States Catholic Conference by Mark E. Chopko; and for Representative Jerome S. Luebbers et al. by Patrick J. Perotti.
>
> Briefs of amici curiae urging affirmance were filed for 274 Organizations in Support of Roe v. Wade by Kathleen M. Sullivan, Susan R. Estrich, Barbara Jordan, and Estelle H. Rogers; for the American College of Obstetricians and Gynecologists et al. by Carter G. Phillips, Elizabeth H. Esty, Ann E. Allen, Stephan E. Lawton, Laurie R. Rockett, and Joel I. Klein; and for the American Psychological Association et al. by Donald N. Bersoff.
>
> Briefs of amici curiae were filed for the American Indian Health Care Association et al. by Rhonda Copelon and Nadine Taub; for Focus on the Family et al. by H. Robert Showers; for Save America's Youth, Inc., by Lynn D. Wardle; and for 13 Individual Members of the Panel on Adolescent Pregnancy and Childbearing or the Committee on Child Development Research and Public Policy by Hannah E. M. Lieberman and Pamela H. Anderson.

JUDGES: KENNEDY, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, O'CONNOR, and SCALIA, JJ., joined, and an opinion with respect to Part V, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined. SCALIA, J., filed a concurring opinion, post, p. 520. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, post, p. 521. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, post, p. 524.

OPINIONBY: KENNEDY

OPINION:

[*506] [***415] [**2977] JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV, + and an opinion with respect to Part V, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join.

> + JUSTICE STEVENS and JUSTICE O'CONNOR join only Parts I, II, III, and IV of the opinion.

[***LEdHR1A] [1A] [***LEdHR2A] [2A] [***LEdHR3A] [3A] [***LEdHR4A] [4A] [***LEdHR5A] [5A] [***LEdHR6A] [6A] [***LEdHR7A] [7A] [***LEdHR8A] [8A]The Court of Appeals held invalid an Ohio statute that, with certain exceptions, prohibits any person from performing an abortion on an unmarried, unemancipated, minor woman absent notice to one of the [***416] woman's parents or a court order of approval. We reverse, for we determine that the statute accords with our precedents on parental notice and [*507] consent in the abortion context and does not violate the Fourteenth Amendment.

I

A

The Ohio Legislature, in November 1985, enacted Amended Substitute House Bill 319 (H. B. 319), which amended *Ohio Rev. Code Ann. § 2919.12* (1987), and created *Ohio Rev. Code Ann. § § 2151.85* and 2505.073 (Supp. 1988). Section 2919.12(B), the cornerstone of this legislation, makes it a criminal offense, except in four

specified circumstances, for a physician or other person to perform an abortion on an unmarried and unemancipated woman under 18 years of age. See § 2919.12(D) (making the first offense a misdemeanor and subsequent offenses felonies); § 2919.12(E) (imposing civil liability).

The first and second circumstances in which a physician may perform an abortion relate to parental notice and consent. First, a physician may perform an abortion if he provides "at least twenty-four hours actual notice, in person or by telephone," to one of the woman's parents (or her guardian or custodian) of his intention to perform the abortion. § 2919.12(B)(1)(a)(i). The physician, as an alternative, may notify a minor's adult brother, sister, stepparent, or grand-parent, if the minor and the other relative each file an affidavit in the juvenile court stating that the minor fears physical, sexual, or severe emotional abuse from one of her parents. See § § 2919.12(B)(1)(a)(i), 2919.12(B)(1)(b), 2919.12(B)(1)(c). If the physician cannot give the notice "after a reasonable effort," he may perform the abortion after "at least forty-eight hours constructive notice" by both ordinary and certified mail. § 2919.12(B)(2). Second, a physician may perform an abortion on the minor if one of her parents (or her guardian or custodian) has consented to the abortion in writing. See § 2919.12(B)(1)(a)(ii).

The third and fourth circumstances depend on a judicial procedure that allows a minor to bypass the notice and consent [*508] provisions just described. The statute allows a physician to perform an abortion without notifying one of the minor's parents or receiving the parent's consent if a juvenile court issues an order authorizing the minor to consent, § 2919.12(B)(1)(a)(iii), or if a juvenile court or court of appeals, by its inaction, provides constructive authorization for the minor to consent, § 2919.12(B)(1)(a)(iv).

The bypass procedure requires the minor to file a complaint in the juvenile court, stating (1) that she is pregnant; (2) that she is unmarried, under 18 years of age, and unemancipated; (3) that she desires to have an abortion without notifying one of her parents; (4) that she has sufficient maturity and information to make an intelligent decision whether to have an abortion without such notice, *or* that one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her, *or* that notice is not in her best interests; and (5) that she has or has not retained an attorney. § § 2151.85(A)(1)-(5). The Ohio Supreme Court, as discussed below, has prescribed pleading forms for the minor to use. See App. 6-14.

The juvenile court must hold a hearing at the earliest possible time, [***417] but not later than the fifth business day after the minor files the complaint. § 2151.85(B)(1). The court must render its decision immediately after the conclusion of the hearing. *Ibid.* Failure to hold the hearing within this time results in [**2978] constructive authorization for the minor to consent to the abortion. *Ibid.* At the hearing the court must appoint a guardian ad litem and an attorney to represent the minor if she has not retained her own counsel. § 2151.85(B)(2). The minor must prove her allegation of maturity, pattern of abuse, or best interests by clear and convincing evidence, § 2151.85(C), and the juvenile court must conduct the hearing to preserve the anonymity of the complainant, keeping all papers confidential. § § 2151.85(D), (F).

The minor has the right to expedited review. The statute provides that, within four days after the minor files a [*509] notice of appeal, the clerk of the juvenile court shall deliver the notice of appeal and record to the state court of appeals. § 2505.073(A). The clerk of the court of appeals dockets the appeal upon receipt of these items. *Ibid.* The minor must file her brief within four days after the docketing. *Ibid.* If she desires an oral argument, the court of appeals must hold one within five days after the docketing and must issue a decision immediately after oral argument. *Ibid.* If she waives the right to an oral argument, the court of appeals must issue a decision within five days after the docketing. *Ibid.* If the court of appeals does not comply with these time limits, a constructive order results authorizing the minor to consent to the abortion. *Ibid.*

B

Appellees in this action include the Akron Center for Reproductive Health, a facility that provides abortions; Max Pierre Gaujean, M. D., a physician who performs abortions at the Akron Center; and Rachael Roe, an unmarried, unemancipated, minor woman, who sought an abortion at the facility. In March 1986, days before the effective date of H. B. 319, appellees and others brought a facial challenge to the constitutionality of the statute in the United States District Court for the Northern District of Ohio. The District Court, after various proceedings, issued a preliminary injunction and later a permanent injunction preventing the State of Ohio from enforcing the statute. *Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123 (1986).*

The Court of Appeals for the Sixth Circuit affirmed, concluding that H. B. 319 had six constitutional defects. These points, discussed below, related to the sufficiency of the expedited procedures, the guarantee of anonymity, the constructive authorization provisions, the clear and convincing evidence standard, the pleading requirements, and the physician's personal obligation to give notice to one of the minor's [*510] parents. *Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (1988).* The

State of Ohio, on appeal under *28 U. S. C. § 1254*(2) (1982 ed.), prob. juris. noted, *492 U.S. 916 (1989),* challenges the Court of Appeals' decision in its entirety. Appellees seek affirmance on the grounds adopted by the Court of Appeals and on other grounds.

II

We have decided five cases addressing the constitutionality of parental notice or parental consent statutes in the abortion context. See *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52,* [***418] *49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976); Bellotti v. Baird, 443 U.S. 622, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979); H. L. v. Matheson, 450 U.S. 398, 67 L. Ed. 2d 388, 101 S. Ct. 1164 (1981); Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983).* We do not need to determine whether a statute that does not accord with these cases would violate the Constitution, for we conclude that H. B. 319 is consistent with them.

A

[***LEdHR1B] [1B] [***LEdHR9] [9] [***LEdHR10] [10]This dispute turns, to a large extent, on the adequacy of H. B. 319's judicial bypass procedure. In analyzing this aspect of the dispute, we note that, although our cases have required bypass procedures for parental consent statutes, we have not decided whether [**2979] parental notice statutes must contain such procedures. See *Matheson, 450 U.S. at 413, and n.25* (upholding a notice statute without a bypass procedure as applied to immature, dependent minors). We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, H. B. 319's bypass procedure meets the requirements identified for parental consent statutes in *Danforth, Bellotti, Ashcroft,* and *Akron. Danforth* established that, [HN1] in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a State must provide some sort of bypass procedure if it elects to require parental [*511] consent. See *428 U.S. at 74.* As we hold today in *Hodgson v. Minnesota, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926,* it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute. See also *Matheson, 450 U.S. at 411, n.17* (notice statutes are not equivalent to consent statutes because they do not give anyone a veto power of over a minor's abortion decision).

[***LEdHR1C] [1C]The principal opinion in *Bellotti* stated [HN2] four criteria that a bypass procedure in a consent statute must satisfy. Appellees contend that the bypass procedure does not satisfy these criteria. We disagree. First, the *Bellotti* principal opinion indicated that the procedure must allow the minor to show that she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parents' wishes. See *443 U.S. at 643* (opinion of Powell, J.). The Court reaffirmed this requirement in *Akron* by holding that a State cannot presume the immaturity of girls under the age of 15. *462 U.S. at 440.* In the case now before us, we have no difficulty concluding that H. B. 319 allows a minor to show maturity in conformity with the principal opinion in *Bellotti.* The statute permits the minor to show that she "is sufficiently mature and well enough informed to decide intelligently whether to have an abortion." *Ohio Rev. Code Ann. § 2151.85(C)(1)* (Supp. 1988).

Second, the *Bellotti* principal opinion indicated that the procedure must allow the minor to show that, even if she cannot make the abortion decision by herself, "the desired abortion would be in her best interests." [***419] *443 U.S. at 644.* We believe that H. B. 319 satisfies the *Bellotti* language as quoted. The statute requires the juvenile court to authorize the minor's consent where the court determines that the abortion is in the minor's best interest and in cases where the minor has shown a pattern of physical, sexual, or emotional abuse. See § 2151.85(C)(2).

[*512] Third, the *Bellotti* principal opinion indicated that the procedure must insure the minor's anonymity. See *443 U.S. at 644.* H. B. 319 satisfies this standard. Section 2151.85 (D) provides that "the [juvenile] court shall not notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion." [HN3] Section 2151.85(F) further states:

> "Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records."

Section 2505.073(B), in a similar fashion, requires the court of appeals to preserve the minor's anonymity and confidentiality of all papers on appeal. The State, in addition, makes it a criminal offense for an employee to disclose documents not designated as public records. See § § 102.03(B), 102.99(B).

[***LEdHR2B] [2B]Appellees argue that the complaint forms prescribed by the Ohio Supreme Court will require

the minor to disclose her identity. Unless the minor has counsel, she must sign [**2980] a complaint form to initiate the bypass procedure and, even if she has counsel, she must supply the name of one of her parents at four different places. See App. 6-14 (pleading forms). Appellees would prefer protections similar to those included in the statutes that we reviewed in *Bellotti* and *Ashcroft*. The statute in *Bellotti* protected anonymity by permitting use of a pseudonym, see *Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1025 (CA1 1981),* and the statute in *Ashcroft* allowed the minor to sign the petition with her initials, see *462 U.S. at 491, n.16.* Appellees also maintain that the Ohio laws requiring court employees not to disclose public documents are irrelevant because the right to anonymity is broader than the right not to have officials reveal one's identity to the public at large.

[*513] Confidentiality differs from anonymity, but we do not believe that the distinction has constitutional significance in the present context. The distinction has not played a part in our previous decisions, and, even if the *Bellotti* principal opinion is taken as setting the standard, we do not find complete anonymity critical. H. B. 319, like the statutes in *Bellotti* and *Ashcroft*, takes reasonable steps to prevent the public from learning of the minor's identity. We refuse to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees. H. B. 319, like many sophisticated judicial procedures, requires participants to provide identifying information for administrative purposes, not for public disclosure.

[***LEdHR1D] [1D]Fourth, the *Bellotti* principal [***420] opinion indicated that courts must conduct a bypass procedure with expedition to allow the minor an effective opportunity to obtain the abortion. See *443 U.S. at 644.* H. B. 319, as noted above, requires the trial court to make its decision within five "business day[s]" after the minor files her complaint, § 2151.85(B)(1); requires the court of appeals to docket an appeal within four "days" after the minor files a notice of appeal, § 2505.073(A); and requires the court of appeals to render a decision within five "days" after docketing the appeal, *ibid.*

The District Court and the Court of Appeals assumed that all of the references to days in § § 2151.85(B)(1) and 2505.073(A) meant business days as opposed to calendar days. Cf. Ohio Rule App. Proc. 14(A) (excluding nonbusiness days from computations of less than seven days). They calculated, as a result, that the procedure could take up to 22 calendar days because the minor could file at a time during the year in which the 14 business days needed for the bypass procedure would encompass 3 Saturdays, 3 Sundays, and 2 legal holidays. Appellees maintain, on the basis of an affidavit included in the record, that a 3-week delay could increase by a substantial measure both the costs and the medical risks of an abortion. See App. 18. They conclude, as did those [*514] courts, that H. B. 319 does not satisfy the *Bellotti* principal opinion's expedition requirement.

[***LEdHR3B] [3B] [***LEdHR11] [11]As a preliminary matter, the 22-day calculation conflicts with two well-known rules of construction discussed in our abortion cases and elsewhere. [HN4] "Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Ashcroft, 462 U.S. at 493* (opinion of Powell, J.). Although we recognize that the other federal courts "'are better schooled in and more able to interpret the laws of their respective States'" than are we, *Frisby v. Schultz, 487 U.S. 474, 482, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988),* the Court of Appeals' decision strikes us as dubious. Interpreting the term "days" in § 2505.073(A) to mean business days instead of calendar days seems inappropriate and unnecessary because of the express and contrasting use of "business day[s]" in § 2151.85(B)(1). In addition, [HN5] because appellees are making a facial challenge to a statute, they must show that "no set of circumstances exists under which the Act would be valid." *Webster v. Reproductive Health Services, 492 U.S. 490, 524, 106 L. Ed. 2d 410, 109 S. Ct. 3040* [**2981] *(1989)* (O'CONNOR, J., concurring). The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur. Cf. *Ohio Rev. Code Ann. § 2505.073(A)* (Supp. 1988) (allowing the court of appeals, upon the minor's motion, to shorten or extend the time periods). Moreover, under our precedents, the mere possibility that the procedure may require up to 22 days in a rare case is plainly insufficient to invalidate the statute on its face. *Ashcroft*, for example, upheld a Missouri statute that contained a bypass procedure that could require 17 calendar days plus a sufficient time for deliberation and decisionmaking at both the trial and appellate levels. See *462 U.S. at 477, n.4, 491, n.16.*

B

[***LEdHR4B] [4B]Appellees ask us, in effect, to [***421] extend the criteria used by some Members of the Court in *Bellotti* and the cases following it by imposing three additional requirements on bypass [*515] procedures. First, they challenge the constructive authorization provisions in H. B. 319, which enable a minor to obtain an abortion without notifying one of her parents if either the juvenile court or the court of appeals fails to act within the prescribed time limits. See *Ohio Rev. Code Ann. § § 2151.85 (B)(1)*, 2505.073(A), and 2919.12(B)(1)(a)(iv) (1987 and Supp. 1988). They

speculate that the absence of an affirmative order when a court fails to process the minor's complaint will deter the physician from acting.

We discern no constitutional defect in the statute. Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements. There is no showing that the time limitations imposed by H. B. 319 will be ignored. With an abundance of caution, and concern for the minor's interests, Ohio added the constructive authorization provisions in H. B. 319 to ensure expedition of the bypass procedures even if these time limits are not met. The State represents that a physician can obtain certified documentation from the juvenile or appellate court that constructive authorization has occurred. Brief for Appellant 36. We did not require a similar safety net in the bypass procedures in *Ashcroft, supra, at 479-480, n.4,* and find no defect in the procedures that Ohio has provided.

[***LEdHR5B] [5B]Second, appellees ask us to rule that a bypass procedure cannot require a minor to prove maturity or best interests by a standard of clear and convincing evidence. They maintain that, when a State seeks to deprive an individual of liberty interests, it must take upon itself the risk of error. See *Santosky v. Kramer, 455 U.S. 745, 755, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982).* House Bill 319 violates this standard, in their opinion, not only by placing the burden of proof upon the minor, but also by imposing a heightened standard of proof.

This contention lacks merit. A State does not have to bear the burden of proof on the issues of maturity or best interests. The principal opinion in *Bellotti* indicates that [HN6] a State may require the minor to prove these facts in a bypass [*516] procedure. See *443 U.S. at 643* (opinion of Powell, J.). A State, moreover, may require a heightened standard of proof when, as here, the bypass procedure contemplates an *ex parte* proceeding at which no one opposes the minor's testimony. We find the clear and convincing standard used in H. B. 319 acceptable. The Ohio Supreme Court has stated:

> [HN7] "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable [**2982] doubt as in criminal cases. It does not mean clear and unequivocal." *Cross v. Ledford, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954)* (emphasis deleted).

Our precedents do not require the State to set a lower standard. Given that the minor is assisted in the [***422] courtroom by an attorney as well as a guardian ad litem, this aspect of H. B. 319 is not infirm under the Constitution.

[***LEdHR6B] [6B]Third, appellees contend that the pleading requirements in H. B. 319 create a trap for the unwary. The minor, under the statutory scheme and the requirements prescribed by the Ohio Supreme Court, must choose among three pleading forms. See *Ohio Rev. Code Ann. § 2151.85(C)* (Supp. 1988); App. 6-14. The first alleges only maturity and the second alleges only best interests. She may not attempt to prove both maturity and best interests unless she chooses the third form, which alleges both of these facts. Appellees contend that the complications imposed by this scheme deny a minor the opportunity, required by the principal opinion in *Bellotti*, to prove either maturity or best interests or both. See *443 U.S. at 643-644.*

Even on the assumption that the pleading scheme could produce some initial confusion because few minors would have counsel when pleading, the simple and straightforward procedure does not deprive the minor of an opportunity to [*517] prove her case. It seems unlikely that the Ohio courts will treat a minor's choice of complaint form without due care and understanding for her unrepresented status. In addition, we note that the minor does not make a binding election by the initial choice of pleading form. The minor, under H. B. 319, receives appointed counsel after filing the complaint and may move for leave to amend the pleadings. See § 2151.85(B) (2); Ohio Rule Juvenile Proc. 22(B); see also *Hambleton v. R. G. Barry Corp., 12 Ohio St. 3d 179, 183-184, 465 N.E.2d 1298, 1302 (1984)* (finding a liberal amendment policy in the state civil rules). Regardless of whether Ohio could have written a simpler statute, H. B. 319 survives a facial challenge.

III

[***LEdHR7B] [7B]Appellees contend our inquiry does not end even if we decide that H. B. 319 conforms to *Danforth, Bellotti, Matheson, Ashcroft,* and *Akron.* They maintain that H. B. 319 gives a minor a state-law substantive right "to avoid unnecessary or hostile parental involvement" if she can demonstrate that her maturity or best interests favor abortion without notifying one of her parents. They argue that H. B. 319 deprives the minor of this right without due process because the pleading requirements, the alleged lack of expedition and ano-

nymity, and the clear and convincing evidence standard make the bypass procedure unfair. See *Mathews v. Eldridge, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).* We find no merit in this argument.

[***LEdHR2C] [2C] [***LEdHR3C] [3C] [***LEdHR4C] [4C] [***LEdHR5C] [5C] [***LEdHR6C] [6C]The confidentiality provisions, the expedited procedures, and the pleading form requirements, on their face, satisfy the dictates of minimal due process. We see little risk of erroneous deprivation under these provisions and no need to require additional procedural safeguards. The clear and convincing evidence standard, for reasons we have described, does not place an unconstitutional burden on the types of proof to be presented. The minor is assisted by an attorney and a guardian ad litem and the proceeding is *ex parte*. The [*518] standard ensures that the judge will take special care in deciding whether the [***423] minor's consent to an abortion should proceed without parental notification. As a final matter, given that the statute provides definite and reasonable deadlines, *Ohio Rev. Code Ann. § 2505.073(A)* (Supp. 1988), the constructive authorization provision, § 2151.85(B)(1), also comports with due process on its face.

IV

[***LEdHR8B] [8B]Appellees, as a final matter, contend that we should invalidate H. B. 319 in its [**2983] entirety because the statute requires the parental notice to be given by the physician who is to perform the abortion. In *Akron*, the Court found unconstitutional a requirement that the attending physician provide the information and counseling relevant to informed consent. See *462 U.S. at 446-449.* Although the Court did not disapprove of informing a woman of the health risks of an abortion, it explained that "the State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." *Id., at 448.* Appellees maintain, in a similar fashion, that Ohio has no reason for requiring the minor's physician, rather than some other qualified person, to notify one of the minor's parents.

Appellees, however, have failed to consider our precedent on this matter. We upheld, in *Matheson*, a statute that required a physician to notify the minor's parents. See *450 U.S. at 400.* The distinction between notifying a minor's parents and informing a woman of the routine risks of an abortion has ample justification; although counselors may provide information about general risks as in *Akron*, appellees do not contest the superior ability of a physician to garner and use information supplied by a minor's parents upon receiving notice. We continue to believe that a State may require the physician himself or herself to take reasonable [*519] steps to notify a minor's parent because the parent often will provide important medical data to the physician. As we explained in *Matheson:*

> "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." *450 U.S. at 411* (footnote omitted).

The conversation with the physician, in addition, may enable a parent to provide better advice to the minor. The parent who must respond to an event with complex philosophical and emotional dimensions is given some access to an experienced and, in an ideal case, detached physician who can assist the parent in approaching the problem in a mature and balanced way. This access may benefit both the parent and child in a manner not possible through notice by less qualified persons.

Any imposition on a physician's schedule, by requiring him or her to [***424] give notice when the minor does not have consent from one of her parents or court authorization, must be evaluated in light of the complete statutory scheme. The statute allows the physician to send notice by mail if he or she cannot reach the minor's parent "after a reasonable effort," *Ohio Rev. Code Ann. § 2919.12(B)(2)* (1987), and also allows him or her to forgo notice in the event of certain emergencies, see § 2919.12(C)(2). These provisions are an adequate recognition of the physician's professional status. On this facial challenge, we find the physician notification requirement unobjectionable.

V

The Ohio statute, in sum, does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an [*520] abortion. We believe, in addition, that the legislature acted in a rational manner in enacting H. B. 319. A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek

an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The State is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, [**2984] society's most intimate association. It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature. The statute in issue here is a rational way to further those ends. It would deny all dignity to the family to say that the State cannot take this reasonable step in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent. We uphold H. B. 319 on its face and reverse the judgment of the Court of Appeals.

It is so ordered.

CONCURBY: SCALIA; STEVENS (In Part)

CONCUR:

JUSTICE SCALIA, concurring.

I join the opinion of the Court, because I agree that the Ohio statute neither deprives minors of procedural due process nor contradicts our holdings regarding the constitutional right to abortion. I continue to believe, however, as I said in my separate concurrence last Term in *Webster v. Reproductive Health Services, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989),* that the Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution -- not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins. Leaving this matter to the political process is not only legally correct, it is pragmatically so. That alone -- and not lawyerly dissection of federal judicial [*521] precedents -- can produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process. The Court should end its disruptive intrusion into this field as soon as possible.

[***425] JUSTICE STEVENS, concurring in part and concurring in the judgment.

As the Court emphasizes, appellees have challenged the Ohio statute only on its face. The State may presume that, in most of its applications, the statute will reasonably further its legitimate interest in protecting the welfare of its minor citizens. See *H. L. v. Matheson, 450 U.S. 398, 422-423, 67 L. Ed. 2d 388, 101 S. Ct. 1164 (1981)* (STEVENS, J., concurring in judgment). In some of its applications, however, the one-parent notice requirement will not reasonably further that interest. There will be exceptional situations in which notice will cause a realistic risk of physical harm to the pregnant woman, will cause trauma to an ill parent, or will enable the parent to prevent the abortion for reasons that are unrelated to the best interests of the minor. The Ohio statute recognizes that possibility by providing a judicial bypass. The question in this case is whether that statutory protection for the exceptional case is so obviously inadequate that the entire statute should be invalidated. I am not willing to reach that conclusion before the statute has been implemented and the significance of its restrictions evaluated in the light of its administration. I therefore agree that the Court of Appeals' judgment must be reversed, and I join Parts I-IV of the Court's opinion. n1

n1 It is perhaps trite for a judge to reiterate the familiar proposition that an opinion about the facial constitutionality of a statute says nothing about the judge's views concerning the wisdom or unwisdom of the measure. I have made this observation before, see *National League of Cities v. Usery, 426 U.S. 833, 881, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976)* (dissenting opinion), and am moved by JUSTICE BLACKMUN's eloquent dissent to do so again. It would indeed be difficult to contend that each of the challenged provisions of the Ohio statute -- or the entire mosaic -- represents wise legislation.

[*522] [**2994] The Court correctly states that we have not decided the specific question whether a judicial bypass procedure is necessary in order to save the constitutionality of a one-parent notice statute. See *497 U.S. at 510.* We have, however, squarely held that a requirement of preabortion parental notice in all cases involving pregnant minors is unconstitutional. Although it need not take the form of a judicial bypass, the State must provide an adequate mechanism for cases in which the minor is mature or notice would not be in her best interests.

In *Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983),* the city argued that the constitutionality of its ordinance requiring parental consent was saved by the minor's opportunity to invoke the State's juvenile court procedures. We held the same day in *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 493, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983)* (opinion of Powell, J.), that a similar provision which did not require parental notification avoided any constitutional infirmities in such a statute. We rejected the argument in *Akron,* however, because the procedures in that case required that the parent be given notice when the

minor's petition was filed. Writing for six Justices, including the author of the Court's opinion in *H. L. v. Matheson, supra,* Justice Powell explained:

> [***426] "Even assuming that the Ohio courts would construe these provisions as permitting a minor to obtain judicial approval for the 'proper or necessary . . . medical or surgical care' of an abortion, where her parents had refused to provide that care, the statute makes no provision for a mature or emancipated minor completely to avoid hostile parental involvement by demonstrating to the satisfaction of the court that she is capable of exercising her constitutional right to choose an abortion. On the contrary, the statute requires that the minor's parents be notified once a petition has been filed, [*Ohio Rev. Code Ann.] § 2151.28* [(Supp. 1982)], a requirement that in the case [*523] of a mature minor seeking an abortion would be unconstitutional. See *H. L. v. Matheson, 450 U.S. at 420* (POWELL, J., concurring); *id., at 428, n.3* (MARSHALL, J., dissenting)." *462 U.S. at 441, n.31.*

Thus, while a judicial bypass may not be necessary to take care of the cases in which the minor is mature or parental notice would not be in her best interests -- and, indeed, may not be the preferable mechanism -- the Court has held that some provision must be made for such cases.

The Ohio statute, on its face, provides a sufficient procedure for those cases. The pleading requirements and the constructive authorization and confidentiality provisions of the Act satisfy the standards established in *Ashcroft, supra,* for a judicial bypass. As the Court states, the minor is not bound by her initial choice of pleading form, *497 U.S. at 517,* the constructive authorization provision functions as an additional "safety net" when the statutory deadlines are not met, *ante*, at 515, and the State has taken reasonable steps to ensure confidentiality, *ante*, at 512-513. The requirement that the minor prove maturity or best interests by clear and convincing evidence is supported by the presumption that notification to a parent will in most circumstances be in the minor's best interests: It is not unreasonable to require the minor, *when assisted by counsel and a guardian ad litem, ante*, at 517-518, to overcome that presumption by clear and convincing evidence. Cf. *Parham v. J. R., 442 U.S. 584, 610, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979)* ("Presumption that parents act in the best interests of their child" is relevant [**2995] in determining what process is due in commitment proceeding). n2 I have more concern [*524] about the possible delay in the bypass procedure, but the statute permits the Ohio courts to expedite the procedure upon a showing of good cause, see *497 U.S. at 515* (citing *Ohio Rev. Code Ann. § 2505.073(A)* (Supp. 1988)), and sensitive administration of the deadlines [***427] may demonstrate that my concern is unwarranted.

> n2 The standard of proof for the minor's abortion decision is no more onerous than that for any medical procedure of which the parents may disapprove. Under Ohio law, a determination that a child is neglected or dependent, which is necessary before a court or guardian ad litem may authorize proper or necessary medical or surgical care, must be made by clear and convincing evidence. See *Ohio Rev. Code Ann. § 2151.35* (Supp. 1988); see also *In re Willmann, 24 Ohio App. 3d 191, 198-199, 493 N.E.2d 1380, 1389 (1986); In re Bibb, 70 Ohio App. 2d 117, 120, 435 N.E.2d 96, 99 (1980).*

There is some tension between the statutory requirement that the treating physician notify the minor's parent and our decision in *Akron, 462 U.S. at 446-449,* that a State may not require the attending physician to personally counsel an abortion patient. One cannot overlook the possibility that this provision was motivated more by a legislative interest in placing obstacles in the woman's path to an abortion, see *Maher v. Roe, 432 U.S. 464, 474, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977),* than by a genuine interest in fostering informed decisionmaking. I agree with the Court, however, that the Ohio statute requires only that the physician take "reasonable steps" to notify a minor's parent and that such notification may contribute to the decisionmaking process. *497 U.S. at 518-519.* Accordingly, I am unable to conclude that this provision is unconstitutional on its face.

DISSENTBY: BLACKMUN

DISSENT:

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

I

The constitutional right to "control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term," *Webster v. Reproductive Health Services, 492 U.S. 490, 538, 106 L. Ed. 2d*

410, 109 S. Ct. 3040 (1989) (opinion concurring in part and dissenting in part), does "not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of* [*525] *Central Mo. v. Danforth, 428 U.S. 52, 74, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976); Hodgson v. Minnesota, 497 U.S. at 435* ("The constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women"). Although the Court "has recognized that the State has somewhat broader authority to regulate the activities of children than of adults," in doing so, the State nevertheless must demonstrate that there is a "*significant state interest* in conditioning an abortion . . . that is not present in the case of an adult." *Danforth, 428 U.S. at 74-75* (emphasis added). "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id., at 75.*

"The abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with *particular sensitivity* when it legislates to foster parental involvement in this matter." *Bellotti v. Baird, 443 U.S. 622, 642, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979)* (opinion of Powell, J.) (emphasis added) *(Bellotti II)*. "Particular sensitivity" is mandated because "there are few situations in which denying a minor the right to make an important decision [***428] will have consequences [**2985] so grave and indelible." *Ibid.* It should be obvious that "considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." *Ibid.*

The State of Ohio has acted with particular *in*sensitivity in enacting the statute the Court today upholds. Rather than create a judicial-bypass system that reflects the sensitivity necessary when dealing with a minor making this deeply intimate decision, Ohio has created a tortuous maze. Moreover, the State has failed utterly to show that it has any significant [*526] state interest in deliberately placing its pattern of obstacles in the path of the pregnant minor seeking to exercise her constitutional right to terminate a pregnancy. The challenged provisions of the Ohio statute are merely "poorly disguised elements of discouragement for the abortion decision." *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 763, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986).*

II

The majority does not decide whether the Ohio parental-notice statute must contain a judicial-bypass procedure because the majority concludes that the bypass procedure in the statute "meets the requirements identified for parental consent statutes in *Danforth, Bellotti, Ashcroft*, and *Akron*." *497 U.S. at 510.* I conclude, however, that, because of the minor's emotional vulnerability and financial dependency on her parents, and because of the "unique nature of the abortion decision," *Bellotti II, 443 U.S. at 642,* and its consequences, a parental-notice statute is tantamount to a parental-consent statute. As a practical matter, a notification requirement will have the same deterrent effect on a pregnant minor seeking to exercise her constitutional right as does a consent statute. See *Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 441, n.31, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983); H. L. v. Matheson, 450 U.S. 398, 420, n.9, 67 L. Ed. 2d 388, 101 S. Ct. 1164 (1981)* (concurring opinion). Thus a notice statute, like a consent statute, must contain a bypass procedure that comports with the standards set forth in *Bellotti II*. Because I disagree with the Court's conclusion that the Ohio bypass procedure complies with the dictates of *Bellotti II* and its progeny, I would strike down Ohio Amended Substitute House Bill 319.

The *Bellotti II* principal opinion stated: "A pregnant minor is entitled in such a [judicial-bypass] proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) [*527] that even if she is not able to make this decision independently, the desired abortion would be in her best interests." *443 U.S. at 643-644* (opinion of Powell, J.) (footnote omitted). The language of the Ohio statute purports to follow the standards for a bypass procedure that are set forth in *Bellotti II*, but at each stage along the way, the statute deliberately places "substantial state-created obstacles in the pregnant [minor's] path to an abortion," *Maher v. Roe, 432 U.S. 464, 477, n.10, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977),* in the legislative hope that she will [***429] stumble, perhaps fall, and at least ensuring that she "conquer a multifaceted obstacle course" before she is able to exercise her constitutional right to an abortion. Dellinger & Sperling, Abortion and the Supreme Court: Retreat from *Roe v. Wade, 138 U. Pa. L. Rev. 83, 100 (1989).* The majority considers each provision in a piecemeal fashion, never acknowledging or assessing the "degree of burden that the entire regime of abortion regulations places" on the minor. *Ibid.*

A

The obstacle course begins when the minor first enters the courthouse to fill out the complaint forms. The "'procedural trap,'" as it appropriately was described by the [**2986] Court of Appeals, *Akron Center for Reproductive Health v. Slaby, 854 F.2d 852, 863 (CA6 1988),* requires the minor to choose among three forms. The first alleges *only* maturity; the second alleges *only* that the abortion is in her best interest. App. 6-11. Only if the minor chooses the third form, which alleges both, *id.*, at 12-13, may the minor attempt to prove both maturity *and* best interest as is her right under *Bellotti II.* See *Ohio Rev. Code Ann. § 2151.85(C)(3)* (Supp. 1988). The majority makes light of what it acknowledges might be "some initial confusion" of the unsophisticated minor who is trying to deal with an unfamiliar and mystifying court system on an intensely intimate matter. *497 U.S. at 516-517.* The Court points out that the minor, with counsel appointed after she filed the complaint, "may move for leave to amend the [*528] pleadings" and avers that it "seems unlikely that the Ohio courts will treat a minor's choice of complaint form without due care." *Ante*, at 517. I would take the Ohio Legislature's word, however, that its pleading requirement was intended to be meaningful. The constitutionality of a procedural provision cannot be analyzed on the basis that it may have no effect. If the pleading requirement prevents some minors from showing either that they are mature or that an abortion would be in their best interests, it plainly is unconstitutional.

The majority fails to elucidate *any* state interest in setting up this barricade for the young pregnant woman -- a barricade that will "serve only to confuse . . . her and to heighten her anxiety." *Thornburgh, 476 U.S. at 762.* The justification the State put forward before the Court of Appeals was the "absurd contention that 'any minor claiming to be mature and well enough informed to independently make such an important decision as an abortion should also be mature enough to file her complaint under [the appropriate subsection].'" See *854 F.2d at 863,* quoting Brief for State of Ohio in No. 86-3664, (CA6), p. 43. This proffered "justification" is even more harsh than the Court of Appeals noted. It excludes the mature minor who may not have the intellectual capacity to understand these tangled forms, and it spurns the immature minor who is abused or who contends for some other reason that an abortion without parental involvement would be in her best interest. Surely, the goal of the court proceeding is to assist, not to entrap, the young pregnant woman.

The State's interest in "streamlining" the claims, belatedly asserted for the first time before this Court, is no less absurd. It is ludicrous to [***430] confound the pregnant minor, forced to go to court at this time of crisis in her life, with alternative complaint forms that must later be rescinded by appointed counsel and replaced by the only form that is constitutionally valid. Moreover, this ridiculous pleading scheme leaves to the judge's discretion whether the minor may amend her [*529] pleading and attempt to prove both her maturity and best interest. To allow the resolution of this vital issue to turn on a judge's discretion does not comport with *Bellotti II*'s declaration that the minor who "fails to satisfy the court that she is competent to make this decision independently . . . *must* be permitted to show that an abortion nevertheless would be in her best interests." *443 U.S. at 647-648* (opinion of Powell, J.) (emphasis added).

B

As the pregnant minor attempts to find her way through the labyrinth set up by the State of Ohio, she encounters yet another obstruction even before she has completed the complaint form. In *Bellotti II*, the principal opinion insisted that the judicial-bypass procedure "must assure that a resolution of the issue, and any appeals that may follow, will be completed with *anonymity* . . . ." *Id., at 644* (emphasis added). That statement was not some idle procedural requirement, but stems from the proposition that the Due Process Clause protects the woman's right to make her decision "independently and privately." *Hodgson, 497 U.S. at 434.* [**2987] The zone of privacy long has been held to encompass an "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe, 429 U.S. 589, 599, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977).* The Ohio statute does not safeguard that right. Far from keeping the identity of the minor anonymous, the statute requires the minor to sign her full name and the name of one of her parents on the complaint form. See App. 6-14 (pleading forms). See *497 U.S. at 512* ("Unless the minor has counsel, she must sign a complaint form to initiate the bypass procedure and, even if she has counsel, she must supply the name of one of her parents at four different places"). Acknowledging that "confidentiality differs from anonymity," the majority simply asserts that "complete anonymity" is not "critical." *Ante*, at 513. That easy conclusion is irreconcilable with *Bellotti*'s anonymity requirement. The definition of "anonymous" is "not named or identified." [*530] Webster's Ninth New Collegiate Dictionary 88 (1983). Complete anonymity, then, appears to be the only kind of anonymity that a person could possibly have. The majority admits that case law regarding the anonymity requirement has permitted no less. See *ante*, at 512, citing *Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1025 (CA1 1981)* (pseudonym); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 491, n.16, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983)* (initials). See also *Thornburgh, 476 U.S. at 766* ("The decision to terminate a

pregnancy is an intensely private one that must be protected in a way that assures anonymity").

The majority points to Ohio laws requiring court employees not to disclose public documents, blithely assuming that the "mere possibility of [***431] unauthorized, illegal disclosure by state employees" is insufficient to establish that the confidentiality of the proceeding is not protected. *497 U.S. at 513.* In fact, the provisions regarding the duty of court employees not to disclose public documents amount to no more than "generally stated principles of . . . confidentiality." *American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 297 (CA3 1984),* aff'd on other grounds, *476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986).* As the District Court pointed out, there are no indications of how a clerk's office, large or small, is to ensure that the records of abortion cases will be distinguished from the records of all other cases that are available to the public. *Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123, 1143-1144 (ND Ohio 1986).* Cf. *Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d at 1025* (minor proceeds under pseudonym and affidavit containing her identity is kept in separate, sealed file). Nor are there measures for sealing the record after the case is closed to prevent its public availability; *Planned Parenthood Assn. of the Atlanta Area, Inc. v. Harris, 670 F. Supp. 971, 991 (ND Ga. 1987)* (noting with disapproval that Georgia statute made no provision for court documents to be sealed). [*531] This Court is well aware that, unless special care is taken, court documents of an intimate nature will find their way to the press and public. See *The Florida Star v. B. J. F., 491 U.S. 524, 105 L. Ed. 2d 443, 109 S. Ct. 2603 (1989)* (reporter in police room copied police report and published article with rape victim's full name). The State has offered no justification for its failure to provide specific guidelines to be followed by the juvenile court to ensure anonymity for the pregnant minor -- even though it has in place a procedure to assure the anonymity of juveniles who have been adjudicated delinquent or unruly. See *Ohio Rev. Code Ann. § 2151.358* (1976) (detailed provision for sealing record and for expungement of record).

"A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly." *Thornburgh, 476 U.S. at 766.* A minor, whose very purpose in going [**2988] through a judicial-bypass proceeding is to avoid notifying a hostile or abusive parent, would be most alarmed at signing her name and the name of her parent on the complaint form. Generalized statements concerning the confidentiality of records would be of small comfort, even if she were aware of them. True anonymity is essential to an effective, meaningful bypass. In the face of the forms that the minor must actually deal with, the State's assurances that the minor's privacy will be protected ring very hollow. I would not permit the State of Ohio to force a minor to forgo her anonymity in order to obtain a waiver of the parental-notification requirement.

C

Because a "pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy," this Court has required that the State "must assure" that the "resolution of the issue, and any appeals [***432] that may follow, will be completed with . . . sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti II, 443* [*532] *U.S., at 642, 644* (opinion of Powell, J.); see also *H. L. v. Matheson, 450 U.S. at 412* (time is of the essence in an abortion decision). Ohio's judicial-bypass procedure can consume up to three weeks of a young woman's pregnancy. I would join the Sixth Circuit, the District Court, and the other federal courts that have held that a time span of this length fails to guarantee a sufficiently expedited procedure. See *854 F.2d at 868; 633 F. Supp. at 1143.* See also, *e. g., American College of Obstetricians and Gynecologists v. Thornburgh, 656 F. Supp. 879, 887-888 (ED Pa. 1987)* (statutory scheme allowing 23 days for judicial proceeding is unconstitutional); *Glick v. McKay, 616 F. Supp. 322, 326-327 (Nev. 1985).*

The majority is unconcerned that "the procedure may require up to 22 days in a rare case." *497 U.S. at 514.* I doubt the "rarity" of such cases. In any event, the Court of Appeals appropriately pointed out that, because a minor often does not learn of her pregnancy until a late stage in the first trimester, time lost during that trimester is especially critical. *854 F.2d at 867-868.* The Court ignores the fact that the medical risks surrounding abortion increase as pregnancy advances and that such delay may push a woman into her second trimester, where the medical risks, economic costs, and state regulation increase dramatically. See *Roe v. Wade, 410 U.S. 113, 150, 163, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); H. L. v. Matheson, 450 U.S. at 439, and n.25* (dissenting opinion). Minors, who are more likely to seek later abortions than adult women, n1 and who usually are not financially independent, will suffer acutely from any delay. See *Ashcroft, 462 U.S. at 497-498* (opinion concurring in part and dissenting in part) (an increased cost factor "may seem insignificant from the Court's comfortable perspective," but is not "equally insignificant" to "the unemployed teenager" for whom this additional cost may well put an abortion beyond reach). Because a delay of up to 22 [*533] days may limit significantly a woman's ability to obtain an abortion, I agree with the conclusions of the District Court and the Court of Appeals that the stat-

ute violates this Court's command that a judicial-bypass proceeding be conducted with sufficient speed to maintain "an effective opportunity for an abortion to be obtained." *Bellotti II, 443 U.S. at 644* (opinion of Powell, J.). n2

n1 Indeed, the threat of parental notice itself may cause a minor to delay requesting assistance with her pregnancy. See *H. L. v. Matheson, 450 U.S. 398, 439, 67 L. Ed. 2d 388, 101 S. Ct. 1164, and n.25 (1981)* (dissenting opinion).

n2 The majority finds comfort in *Planned Parenthood of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983),* and insists that this Court upheld a Missouri statute that contained a bypass procedure "that could require 17 calendar days plus a sufficient time for deliberation and decision-making at both the trial and appellate levels." *497 U.S. at 514.* The majority disregards the limited nature of the *Ashcroft* holding. The Court there looked only at the Missouri appellate procedure and determined that the 24-hour deadline for docketing the appeal and the 5-day deadline for completing the record and perfecting the appeal, together with the requirement that the Missouri Supreme Court provide for expedited appeal by court rule, provided a constitutionally sufficient "framework" for complying with *Bellotti*'s mandate for expedited appeals. See *462 U.S. at 491, n.16.* The Court made no ruling as to whether the Missouri law provided constitutionally sufficient expedition at the initial stages of the bypass.

[***433] [**2989] D

The Ohio statute provides that if the juvenile or appellate courts fail to act within the statutory time frame, an abortion without parental notification is "constructively" authorized. Although Ohio's Legislature may have intended this provision to expedite the bypass procedure, the confusion that will result from the constructive-authorization provision will add further delay to the judicial-bypass proceeding, and is yet one more obstruction in the path of the pregnant minor. The physician risks civil damages, criminal penalties, including imprisonment, as well as revocation of his license for disobeying the statute's commands, but the statute provides for no formal court order or other relief to safeguard the physician from these penalties. See § § 2151.85(B)(1), 2919.12(D), 2919.12(E), 4731.22(B)(23). The State argues that a combination of a date-stamped copy of the minor's complaint and [*534] a "docket sheet showing no entry" would inform the physician that the abortion could proceed. Brief for Appellant 36. Yet, the mere absence of an entry on a court's docket sheet hardly would be reassuring to a physician facing such dire consequences, and the State offers no reason why a formal order or some kind of actual notification from the clerk of court would not be possible. There is no doubt that the nebulous authorization envisioned by this statute "in conjunction with a statute imposing strict civil and criminal liability . . . could have a profound chilling effect on the willingness of physicians to perform abortions . . . ." *Colautti v. Franklin, 439 U.S. 379, 396, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979).* I agree with the Court of Appeals that the "practical effect" of the "'pocket approval'" provision is to frustrate the minor's right to an expedient disposition of her petition. *854 F.2d at 868.*

E

If the minor is able to wend her way through the intricate course of preliminaries Ohio has set up for her and at last reaches the court proceeding, the State shackles her even more tightly with still another "extra layer and burden of regulation on the abortion decision." *Danforth, 428 U.S. at 66.* The minor must demonstrate by "clear and convincing evidence" either (1) her maturity; (2) or that one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her; or (3) that notice to a parent is not in her best interest. § 2151.85(C). The imposition of this heightened standard of proof unduly burdens the minor's right to seek an abortion and demonstrates a fundamental misunderstanding of the real nature of a court-bypass proceeding.

The function of a standard of proof is to "'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions,'" *Addington v. Texas, 441 U.S. 418, 423, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979),* quoting *In re Winship, 397 U.S. 358, 370, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)* (concurring [***434] opinion), and is "a societal judgment about how the risk of error [*535] should be distributed between the litigants." *Santosky v. Kramer, 455 U.S. 745, 755, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982).* By imposing such a stringent standard of proof, this Ohio statute improperly places the risk of an erroneous decision on the minor, the very person whose fundamental right is at stake. Cf. *id., at 756* (clear and convincing standard [**2990] of proof usually has been employed to preserve fundamental fairness in a variety of *government-initiated* proceedings that threaten to deprive the *individual* involved with a significant deprivation of liberty). Even if the judge is satisfied that the minor is mature or that an abortion is in her best interest, the court may not authorize the procedure unless it additionally finds that the evidence meets a "clear and convincing" standard of proof.

The majority asserts that a State may require a heightened standard of proof because the procedure is *ex parte*. *497 U.S. at 516.* According to the majority, the only alternative to the "clear and convincing" standard is a preponderance of the evidence standard, which would require proof by the greater weight of the evidence. The majority reasons that the preponderance standard is unsuited to a *Bellotti II* bypass because, if the minor presents any evidence at all, and no evidence is put forth in opposition, the minor always will present the greater weight of the evidence. Yet, as the State explained at argument, the bypass procedure is inquisitorial in nature, where the judge questions the minor to discover if she meets the requirements set down in *Bellotti II.* See Tr. of Oral Arg. 9. The judge will be making this determination after a hearing that resembles an interview, not an evidentiary proceeding. n3 The District Court observed, "the [*536] judge's decision will necessarily be based largely on subjective standards without the benefit of any evidence other then a woman's testimony." *633 F. Supp. at 1137.* Thus, unlike the procedure the majority seems to envision, it is not the quantity of the evidence presented that is crucial in the bypass proceeding; rather, the crucial factors are the nature of the minor's statements to the judge and her demeanor. Contrary to the majority's theory, if the minor presents evidence that she is mature, she still must *satisfy* the judge that this is so, even without this heightened standard of proof. The use of a heightened standard in the very special context of *Bellotti*'s court-bypass procedure does little to facilitate a fair and reliable result and imports an element from the adversarial process into this unique inquiry where it has no rightful place.

n3 *Bellotti v. Baird, 443 U.S. 622, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979),* itself recognized the unique nature of the bypass procedure when it required the minor merely to show or satisfy the court that she is mature or that an abortion would be in her best interests, without imposing any standard of proof. See also *id., at 643, n.22* (opinion of Powell, J.) ("Much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction").

Although I think the provision is constitutionally infirm for all minors, I am particularly concerned about the effect it will have on sexually or physically abused minors. I agree that parental interest in the welfare of their children is "particularly strong where a *normal* family [***435] relationship exists." *Bellotti II, 443 U.S. at 648* (opinion of Powell, J.) (emphasis added). A minor needs no statute to seek the support of loving parents. Where trust and confidence exist within the family structure, it is likely that communication already exists. n4 If that compassionate support is lacking, an unwanted pregnancy is a poor way to generate it.

n4 It has been said that the majority of all minors voluntarily tell their parents about their pregnancy. The overwhelming majority of those under 16 years of age do so. See Torres, Forrest, & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 Family Planning Perspectives 284, 287-288, 291 (1980).

Sadly, not all children in our country are fortunate enough to be members of loving families. For too many young pregnant women, parental involvement in this most intimate decision [*537] threatens harm, rather than promises comfort. n5 The Court's selective [**2991] blindness to this stark social reality is bewildering and distressing. Lacking the protection that young people typically find in their intimate family associations, these minors are desperately in need of constitutional protection. The sexually or physically abused minor may indeed be "lonely or even terrified," *497 U.S. at 520,* not of the abortion procedure, but of an abusive family member. n6 The Court's placid reference, *ibid.*, to the "compassionate and mature" advice the minor will receive from within the family must seem an unbelievable and cruel irony to those children trapped in violent families. n7

n5 In 1986, more than 1 million children and adolescents suffered harm from parental abuse or neglect, including sexual abuse. See Brief for American Psychological Association et al. as *Amici Curiae* 9-10, and sources cited therein. This figure is considered to be a minimum estimate because the incidence of abuse is substantially underreported. Pregnancy does not deter, and may even precipitate, physical attacks on women. *Ibid.*

n6 "Pregnant minors may attempt to self-abort or to obtain an illegal abortion rather than risk parental notification." *H. L. v. Matheson, 450 U.S. at 439, and n.26* (dissenting opinion).

n7 The majority and the State of Ohio piously fail to mention what happens to these unwanted babies, born to mothers who are little more than children themselves, who have little opportunity, education, or life skills. Too often, the unwanted child becomes trapped in a cycle of poverty, despair, and violence. This Court, by ex-

perience, knows all too well that the States are unable adequately to supervise and protect these vulnerable citizens. See *Baltimore City Dept. of Social Services v. Bouknight, 493 U.S. 549, 107 L. Ed. 2d 992, 110 S. Ct. 900 (1990); DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).*

Under the system Ohio has set up, a sexually abused minor must go to court and demonstrate to a complete stranger by clear and convincing evidence that she has been the victim of a pattern of sexual abuse. When asked at argument what kind of evidence a minor would be required to adduce at her bypass hearing, the State answered that the minor would tell her side to the judge and the judge would consider how well [*538] "the minor is able to articulate what her particular concerns are." Tr. of Oral Arg. 9. The court procedure alone, in many cases, is extremely traumatic. See *Hodgson, 497 U.S. at 441, and n.29.* The State and the Court are impervious to the additional burden imposed on the abused minor who, as any experienced social worker or counselor knows, is often afraid and ashamed to reveal what has happened to her to anyone [***436] outside the home. The Ohio statute forces that minor, despite her very real fears, to experience yet one more hardship. She must attempt, in public, and before strangers, to "articulate what her particular concerns are" with sufficient clarity to meet the State's "clear and convincing evidence" standard. The upshot is that for the abused minor the risk of error entails a risk of violence.

I would affirm the judgments below on the grounds of the several constitutional defects identified by the District Court and the Court of Appeals. The pleading requirements, the so-called and fragile guarantee of anonymity, the insufficiency of the expedited procedures, the constructive-authorization provision, and the "clear and convincing evidence" requirement singly and collectively cross the limit of constitutional acceptance.

III

Even if the Ohio statute complied with the *Bellotti II* requirements for a constitutional court bypass, I would conclude that the Ohio procedure is unconstitutional because it requires the physician's personal and nondelegable obligation to give the required statutory notice. Particularly when viewed in context with the other impediments this statute places in the minor's path, there is more than a "possibility" that the physician-notification provision "was motivated more by a legislative interest in placing obstacles in the woman's path to an abortion, see *Maher v. Roe, 432 U.S. 464, 474, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977),* than by a genuine interest in fostering informed decisionmaking." *497 U.S. at 524* (STEVENS, J., concurring in judgment). Most telling in this regard is the fact that, according [*539] to the Court of Appeals and the District Court, the State has never claimed that personal notice by the physician was required to effectuate [**2992] an interest in the minor's health until the matter reached this Court. In fact, the State has taken three different positions as to its justification for this provision. See *854 F.2d at 862* ("The state's interest is in insuring that immature, unemancipated minors or minors whose best interests require notification have an adequate opportunity for parental intervention. The state has made no showing that this interest is advanced by requiring the attending physician, as opposed to another qualified, responsible person, to effectuate notification"); *633 F. Supp. at 1135* ("The state's attempt to characterize this duty as 'merely ministerial' does not advance its case at all, but rather suggests that its interest in having the physician perform this function is even less weighty than having him or her perform counseling to obtain informed consent [that was struck down in *Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983)].*" If these chimerical health concerns now asserted in fact were the true motivation behind this provision, I seriously doubt that the State would have taken so long to say so.

Even if the State's interest in the health of the minor were the motivation behind the provision, the State never explains why it is that a physician interested in obtaining information, or a parent interested in providing information to a physician, cannot do so following the actual notification by some other competent professional, such as a nurse [***437] or counselor. And the State and the majority never explain why, if the physician's ability to garner information from the parents is of such paramount importance that only the physician may notify the parent, the statute allows the physician to send notice by mail if he or she cannot reach the minor's parent "after a reasonable effort." § 2919.12(B)(2).

The State's asserted interest in the minor's health care is especially ironic in light of the statute's interference with her [*540] physician's experienced professional judgment. n8 "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment," *Doe v. Bolton, 410 U.S. 179, 199, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973),* and he should be permitted to exercise that judgment as to whether he or another professional should be the person who will notify a minor's parents of her decision to terminate her pregnancy. I have no doubt that the attending physician, better than the Ohio Legislature, will know when a consultation with the parent is necessary. "If he fails in this, professional censure and deprivation of his license are available remedies" already in place.

Ibid. The strictures of this Ohio law not only unduly burden the minor's right to an abortion, but impinge on the physician's professional discretion in the practice of medicine. n9

n8 In light of its asserted interest, I find it odd that Ohio allows minors to consent to treatment for sexually transmitted diseases, *Ohio Rev. Code Ann. § 3709.241* (1988), and drug and alcohol abuse, § 3719.012(A). In each of these sensitive areas of health care, the State apparently trusts the physician to use his informed medical judgment as to whether he should question or inform the parent about the minor's medical and psychological condition.

n9 The majority's reliance on *H. L.* v. *Matheson* is misplaced. In that case, unlike this one, the Utah Supreme Court had limited the steps that a physician would have to take to notify the minor's parents. See *450 U.S. at 405.* In contrast, in *Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983),* the Court pointed out that the "critical factor is whether she obtains the necessary information and counseling from a *qualified person*, not the identity of the person from whom she obtains it." *Id., at 448* (emphasis added).

IV

The Ohio Legislature, in its wisdom, in 1985 enacted its antiabortion statute. That statute, when subjected to facial challenge, has been held unconstitutional by the United States District Court for the Northern District of Ohio and by the Court of Appeals for the Sixth Circuit. It is now, however, upheld on that challenge by a majority of this Court. The majority opinion takes up each challenged [**2993] provision [*541] in turn; concludes, with brief comment, that it is within the bounds of the principal opinion in *Bellotti II;* and moves on routinely and in the same fashion to the succeeding provisions, one by one. A plurality then concludes, in Part V of the primary opinion, with hyperbole that can have but one result: to further incite an American press, public, and pulpit already inflamed by the pronouncement made by a plurality of this Court last Term in *Webster v. Reproductive Health Services, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989).* The plurality indulges in paternalistic comments about "profound philosophic choices"; the "[woman's] own destiny and personal dignity"; the "origins of the other human life that lie within the embryo"; [***438] the family as "society's most intimate association"; the striving of the family to give to the minor "advice that is both compassionate and mature"; and the desired assumption that "in most cases" the woman will receive "guidance and understanding from a parent." *497 U.S. at 520.*

Some of this may be so "in most cases" and, it is to be hoped, in judges' own and other warm and protected, nurturing family environments. But those "most cases" need not rely on constitutional protections that are so vital for others. I have cautioned before that there is "another world 'out there'" that the Court "either chooses to ignore or fears to recognize." *Beal v. Doe, 432 U.S. 438, 463, 53 L. Ed. 2d 464, 97 S. Ct. 2366 (1977).* It is the unfortunate denizens of that world, often frightened and forlorn, lacking the comfort of loving parental guidance and mature advice, who most need the constitutional protection that the Ohio Legislature set out to make as difficult as possible to obtain.

That that legislature set forth with just such a goal is evident from the statute it spawned. The underlying nature of the Ohio statute is proclaimed by its strident and offensively restrictive provisions. It is as though the legislature said: "If the courts of the United States insist on upholding a limited right to an abortion, let us make that abortion as difficult as possible to obtain" because, basically, whether on professed [*542] moral or religious grounds or whatever, "we believe that is the way it must be." This often may be the way legislation is enacted, but few are the instances where the injustice is so evident and the impediments so gross as those inflicted by the Ohio Legislature on these vulnerable and powerless young women.

REFERENCES: Return To Full Text Opinion

Go to Supreme Court Brief(s)
Go to Oral Argument Transcript

Supreme Court's views as to validity, under Federal Constitution, of abortion laws

1 Am Jur 2d, Abortion 1.5, 37.5

13A Am Jur Legal Forms 2d, Parent and Child 191:74; 15 Am Jur Legal Forms 2d, Physicians and Surgeons 202:130

USCS, Constitution, Amendment 14

US L Ed Digest, Abortion 8, 9; Constitutional Law 526, 778.5, 830.7

Index to Annotations, Abortion; Children; Notice and Knowledge

Annotation References:

Supreme Court's views as to validity of laws restricting or prohibiting sale or distribution to minors of particular types of goods or services otherwise available to adults. *52 L Ed 2d 892.*

Supreme Court's views as to concept of "liberty" under due process clauses of *Fifth and Fourteenth Amendments. 47 L Ed 2d 975.*

Validity ,under Federal Constitution, of abortion laws. *35 L Ed 2d 735.*

Requisites and conditions of judicial consent to minor's abortion. *23 ALR4th 1061.*

Right of minor to have abortion performed without parental consent. *42 ALR3d 1406.*

EXHIBIT B

NOLLAN ET UX. v. CALIFORNIA COASTAL COMMISSION

No. 86-133

SUPREME COURT OF THE UNITED STATES

483 U.S. 825; 107 S. Ct. 3141; 97 L. Ed. 2d 677; 1987 U.S. LEXIS 2980; 55 U.S.L.W. 5145; 26 ERC (BNA) 1073; 17 ELR 20918

March 30, 1987, Argued
June 26, 1987, Decided

PRIOR HISTORY:

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

DISPOSITION:

177 Cal. App. 3d 719, 223 Cal. Rptr. 28, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant landowners sought review of the decision of the California Court of Appeal, Second Appellate District, ruling that appellee coastal commission could condition the grant of a building permit on the transfer to the public of an easement across appellants' beachfront property.

OVERVIEW: Appellant landowners brought suit to invalidate a condition on their land permit requiring them to grant the public an easement across their beachfront property. The court of appeals found the condition to be valid and reversed the writ of mandamus issued by the superior court. The United States Supreme Court granted review and found that the right to exclude others from private property was an essential right to the ownership of property. If government action resulted in permanent occupation of land, it would effect a taking unless it substantially furthered legitimate state interests. The Court found that California required the use of eminent domain to obtain easements across private property and the condition imposed was not a use of eminent domain. The Court finally held that the condition was a taking and that, if the state wanted an easement, it would have to compensate appellants.

OUTCOME: The judgment of the court of appeals was reversed because conditioning a building permit upon a grant of a public easement constituted a taking of appellant's property and required the state to compensate appellants.

LexisNexis(R) Headnotes

Real & Personal Property Law > Estates, Rights & Titles

[HN1] As to property reserved by its owner for private use, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.

Constitutional Law > Procedural Due Process > Eminent Domain & Takings
Real & Personal Property Law > Eminent Domain Proceedings

[HN2] Where governmental action results in a permanent physical occupation of the property, by the government itself or by others Supreme Court cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. A permanent physical occupation has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

Constitutional Law > Procedural Due Process > Eminent Domain & Takings
Real & Personal Property Law > Eminent Domain Proceedings

[HN3] California case law suggests that to obtain easements of access across private property the State must proceed through its eminent domain power.

Constitutional Law > Procedural Due Process > Eminent Domain & Takings

[HN4] Land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land.

DECISION:

Requiring grant of public easement across beachfront section of private property, as condition of granting permit to build house on property, held to effect taking of property without just compensation in violation of Fifth Amendment.

SUMMARY:

The prospective purchasers of a beachfront lot, which was located between two public beaches, sought to satisfy a condition on their option to purchase by tearing down an old bungalow on the premises and replacing it with a larger house, and sought a permit for such a development of the property from the California Coastal Commission (CCC) as required by state law. The CCC granted the permit on the condition that the purchasers give the public an easement to pass across the portion of the property which lay between the mean high tide line, which defined the seaward edge of the property, and a seawall. The purchasers petitioned the Superior Court of Ventura County, California, for a writ of administrative mandamus to invalidate that condition, and the Superior Court, finding that such a condition could not be imposed absent evidence that the proposed development of the property would have a direct adverse impact on public access to the beach, remanded the case to the CCC for an evidentiary hearing on that issue. After holding such a hearing, the CCC (1) found that the new house would restrict public access to the beach by (a) increasing blockage of the public view of the beach and thus "psychologically" inhibiting the public's recognition of its right of access and (b) increasing private use of the shorefront; and accordingly (2) reaffirmed the permit condition. The purchasers, contending that the imposition of that condition constituted a taking of private property without just compensation in violation of the Fifth Amendment, filed a supplemental petition with the Superior Court. The Superior Court then (1) determined that the administrative record did not show that the new house would create a direct or cumulative burden on public access to the sea, (2) concluded that the CCC had exceeded its statutory authority in imposing the access condition, and (3) ordered the CCC to issue the permit without that condition. The new house was thereafter built, and the sale of the property consummated. However, the California Court of Appeal subsequently ruled that there was substantial evidence to support the decision of the CCC, and accordingly reversed the judgment of the Superior Court and remanded with instructions to deny the petition for a writ of mandate *(117 Cal App 3d 719, 223 Cal Rptr 28).*

On appeal, the United States Supreme Court reversed. In an opinion by Scalia, J., joined by Rehnquist, Ch. J., and White, Powell, and O'Connor, JJ., it was held (1) that a condition on the granting of a land-use permit that serves the same legitimate police-power purpose as a refusal to grant the permit will not be found to be a "taking," within the meaning of the Fifth Amendment prohibition against taking private property for public use without just compensation, if the refusal to issue the permit would not constitute a taking, but that the evident constitutional propriety disappears if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition; (2) that a permit condition requiring the purchasers to allow persons already on the beach to walk across the property (a) does not serve the supposed purpose of protecting the public's visual access to the beach, or of lowering psychological barriers to access to the beach, or of remedying additional congestion on the beach caused by the construction of the new house, and (b) is thus invalid in the absence of compensation; and (3) that even if the requirement of a public easement could be justified on the ground that the public interest would be served by a continuous strip of publicly accessible beach, the state must pay for such an easement.

Brennan, J., joined by Marshall, J., dissented, expressing the view (1) that the proper standard for review of the permit condition, as for other police-power actions, is whether the state could rationally have decided that the measure adopted might achieve the state's objective; (2) that even if a precise match were required between the condition imposed and the specific type of burden on access created by a permitted development, an access requirement permitting traffic along the beach promotes public access to the beach by giving passersby a visual indication of their right of access and by formally declaring that right against increasing private encroachment; (3) that the CCC's regulatory action in this case does not go so far as to constitute a "taking" under the Fifth Amendment, since (a) it allows only the minimal physical intrusion of passage and repassage across a strip of property that is at most ten feet wide, (b) the value and use of the property are not impaired, (c) the condition protects a right of access to navigable waters that is guaranteed by the state constitution, and (d) the purchasers have not been economically injured by the

supposed loss of the full value of their improvements, since the CCC was under no obligation to allow those improvements and the purchasers have benefitted from the permit and from similar restrictions on other properties; and (4) that the court's opinion interferes with the expert judgment and flexibility of response which agencies like the CCC need to deal with increasing development of the shoreline.

Blackmun, J., dissented, expressing the view (1) that the easement exacted from the purchasers and the problems their development created were adequately related to the governmental interest in providing public access to the beach, since the purchasers' development is part of a general development of the shoreline which by its nature makes access to the shore more difficult; and (2) that there was no "taking" of property under the Fifth Amendment in this case, since the CCC's action was a valid exercise of the police power which had no economic effect on the value of the property and did not diminish any investment-backed expectations.

Stevens, J., joined by Blackmun, J., dissented, expressing the view that the uncertainties as to the validity of various types of land-use regulations under the takings clause of the Fifth Amendment, which uncertainties are illustrated by the debate between the opinion of the court and the dissent of Brennan, J., demonstrate the shortsightedness of the court's decision in *First English Evangelical Lutheran Church v Los Angeles County, 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378,* which forces local governments to pay the price for those uncertainties by imposing pecuniary liability for a temporary taking.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]
DOMAIN § 55.5
taking -- land-use regulation -- compensation for easement --
Headnote:[1A][1B][1C][1D]

A condition on the granting of a land-use permit that serves the same legitimate police-power purpose as a refusal to grant the permit will not be found to be a "taking," within the meaning of the Fifth Amendment prohibition against taking private property for public use without just compensation, if the refusal to issue the permit would not constitute a taking, but the evident constitutional propriety disappears if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition; thus, assuming that protecting the public's ability to see a beach, assisting the public in overcoming the "psychological barrier" to using the beach which is created by a developed shoreline, and preventing congestion on the public beaches are legitimate public purposes which would allow a state agency to refuse to permit the prospective purchasers of a beachfront lot to remove a bungalow and build a larger house, the agency would also be able to grant its permission for such development on condition that the purchasers meet some requirement, such as a restriction on the height or width of the house, that would preserve the public's ability to see the beach despite the new house; but since the permit condition actually imposed by the agency, which requires the purchasers to grant a public easement allowing persons already on the beach to walk across that part of the property which lies between the mean high tide line and a seawall, does not serve the supposed purpose of protecting the public's visual access to the beach, or of lowering psychological barriers to access to the beach, or of remedying additional congestion on the beach caused by construction of the new house, the Fifth Amendment requires the state to pay for any such easement, even if the requirement of a public easement is justified, on grounds unrelated to land-use regulation, because the public interest would be served by a continuous strip of publicly accessible beach. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented in part from this holding.)

[***LEdHN2]
DOMAIN § 103
taking -- beachfront easement --
Headnote:[2]

For a state to require the purchasers of a beachfront property to make an easement across their beachfront available to the public on a permanent basis, in order to increase public access to the beach, would constitute a "taking" of property for purposes of the Fifth Amendment prohibition against taking private property for public use without just compensation; where government action results in a permanent physical occupation of property by the government or others, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner, and such permanent physical occupation has occurred where individuals are given a permanent and continuous right to pass to and fro, even though no particular individuals are permitted to station themselves permanently upon the premises.

[***LEdHN3]
PROPERTY § 3
right of exclusion --
Headnote:[3]

As to property reserved by its owner for private use, the right to exclude others is one of the most essential sticks

in the bundle of rights that are commonly characterized as property.

[***LEdHN4]
APPEAL § 744.5
question not raised below --
Headnote:[4]

On appeal from a state appellate court decision which holds that a state agency does not "take" the property of prospective purchasers of a beachfront lot, within the meaning of the Fifth Amendment prohibition against taking private property for public use without just compensation, by requiring the purchasers to grant a public access easement along the beach as a condition of permitting the replacement of a bungalow on the premises with a larger house, the United States Supreme Court will not resolve the question of the applicability of a state constitutional provision which prohibits any individuals from excluding the right of way to any navigable water whenever it is required for any public purpose, in view of (1) the uncertainty as to the applicability of the state constitutional provision under state court decisions, (2) the fact that the state appellate court below did not rest its decision on the state constitutional provision, and (3) the fact that the state agency did not advance an argument based on the state constitutional provision in the state appellate court and may not have had standing to do so.

[***LEdHN5]
DOMAIN § 98
taking -- land-use regulation --
Headnote:[5]

Land-use regulation does not effect a "taking" of property, within the meaning of the Fifth Amendment prohibition against taking private property for public use without just compensation, if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land.

SYLLABUS:

The California Coastal Commission granted a permit to appellants to replace a small bungalow on their beachfront lot with a larger house upon the condition that they allow the public an easement to pass across their beach, which was located between two public beaches. The County Superior Court granted appellants a writ of administrative mandamus and directed that the permit condition be struck. However, the State Court of Appeal reversed, ruling that imposition of the condition did not violate the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment.

Held:

1. Although the outright taking of an uncompensated, permanent, public-access easement would violate the Takings Clause, conditioning appellants' rebuilding permit on their granting such an easement would be lawful land-use regulation if it substantially furthered governmental purposes that would justify denial of the permit. The government's power to forbid particular land uses in order to advance some legitimate police-power purpose includes the power to condition such use upon some concession by the owner, even a concession of property rights, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use. Pp. 831-837.

2. Here the Commission's imposition of the access-easement condition cannot be treated as an exercise of land-use regulation power since the condition does not serve public purposes related to the permit requirement. Of those put forth to justify it -- protecting the public's ability to see the beach, assisting the public in overcoming a perceived "psychological" barrier to using the beach, and preventing beach congestion -- none is plausible. Moreover, the Commission's justification for the access requirement unrelated to land-use regulation -- that it is part of a comprehensive program to provide beach access arising from prior coastal permit decisions -- is simply an expression of the belief that the public interest will be served by a continuous strip of publicly accessible beach. Although the State is free to advance its "comprehensive program" by exercising its eminent domain power and paying for access easements, it cannot compel coastal residents alone to contribute to the realization of that goal. Pp. 838-842.

COUNSEL:

Robert K. Best argued the cause for appellants. With him on the briefs were Ronald A. Zumbrun and Timothy A. Bittle.

Andrea Sheridan Ordin, Chief Assistant Attorney General of California, argued the cause for appellee. With her on the brief were John K. Van de Kamp, Attorney General, N. Gregory Taylor, Assistant Attorney General, Anthony M. Summers, Supervising Deputy Attorney General, and Jamee Jordan Patterson. *

* Briefs of amici curiae urging reversal were filed for the United States by Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Ayer, Deputy Assistant Attorneys General Marzulla, Hookano, and Kmiec, Richard J. Lazarus, and Peter R. Steenland, Jr.;

and for the Breezy Point Cooperative by Walter Pozen.

Briefs of amici curiae urging affirmance were filed for the Commonwealth of Massachusetts et al. by James M. Shannon, Attorney General of Massachusetts, and Lee P. Breckenridge and Nathaniel S. W. Lawrence, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: Don Siegelman of Alabama, John Steven Clark of Arkansas, Joseph Lieberman of Connecticut, Charles M. Oberly of Delaware, Robert Butterworth of Florida, Warren Price III of Hawaii, Neil F. Hartigan of Illinois, Thomas J. Miller of Iowa, Robert T. Stephan of Kansas, William J. Guste, Jr., of Louisiana, James E. Tierney of Maine, J. Joseph Curran, Jr., of Maryland, Hubert H. Humphrey III of Minnesota, William L. Webster of Missouri, Robert M. Spire of Nebraska, Stephen E. Merrill of New Hampshire, W. Cary Edwards of New Jersey, Robert Abrams of New York, Lacy H. Thornburg of North Carolina, Nicholas Spaeth of North Dakota, Dave Frohnmayer of Oregon, James E. O'Neil of Rhode Island, W. J. Michael Cody of Tennessee, Jim Mattox of Texas, Jeffrey Amestoy of Vermont, Kenneth O. Eikenberry of Washington, Charles G. Brown of West Virginia, and Donald J. Hanaway of Wisconsin; for the Council of State Governments et al. by Benna Ruth Solomon and Joyce Holmes Benjamin; for Designated California Cities and Counties by E. Clement Shute, Jr.; and for the Natural Resources Defense Council et al. by Fredric D. Woocher.

Briefs of amici curiae were filed for the California Association of Realtors by William M. Pfeiffer; and for the National Association of Home Builders et al. by Jerrold A. Fadem, Michael M. Berger, and Gus Bauman.

JUDGES:

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Powell, and O'Connor, JJ., joined. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined, post, p. 842. Blackmun, J., filed a dissenting opinion, post, p. 865. Stevens, J., filed a dissenting opinion, in which Blackmun, J., joined, post, p. 866.

OPINIONBY:

SCALIA

OPINION:

[*827] [***683] [**3143] JUSTICE SCALIA delivered the opinion of the Court.

[***LEdHR1A] [1A]James and Marilyn Nollan appeal from a decision of the California Court of Appeal ruling that the California Coastal Commission could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their beachfront property. *177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986).* The California court rejected their claim that imposition of that condition violates the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. *Ibid.* We noted probable jurisdiction. *479 U.S. 913 (1986).*

I

The Nollans own a beachfront lot in Ventura County, California. A quarter-mile north of their property is Faria County Park, an oceanside public park with a public beach and recreation area. Another public beach area, known locally as "the Cove," lies 1,800 feet south of their lot. A concrete seawall approximately eight feet high separates the beach portion of the Nollans' property from the rest of the lot. The historic mean high tide line determines the lot's oceanside boundary.

The Nollans originally leased their property with an option to buy. The building on the lot was a small bungalow, totaling 504 square feet, which for a time they rented to summer vacationers. After years of rental use, however, the building had fallen into disrepair, and could no longer be rented out.

[*828] The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it. In order to do so, under *Cal. Pub. Res. Code Ann. § § 30106*, 30212, and 30600 (West 1986), they were required to obtain a coastal development [**3144] permit from the California Coastal Commission. On February 25, 1982, they submitted a permit application to the Commission in which they proposed to demolish the existing structure and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed that their application had been placed on the administrative calendar, and that the Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side. This would make it easier for the public to get to Faria County Park and the Cove. The Nollans protested imposition of [***684] the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement. App. 31, 34.

On June 3, 1982, the Nollans filed a petition for writ of administrative mandamus asking the Ventura County Superior Court to invalidate the access condition. They argued that the condition could not be imposed absent evidence that their proposed development would have a direct adverse impact on public access to the beach. The court agreed, and remanded the case to the Commission for a full evidentiary hearing on that issue. *Id.*, at 36.

On remand, the Commission held a public hearing, after which it made further factual findings and reaffirmed its imposition of the condition. It found that the new house would increase blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right [*829] to visit." *Id.*, at 58. The new house would also increase private use of the shorefront. *Id.*, at 59. These effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront." *Id.*, at 65-66. Therefore the Commission could properly require the Nollans to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their property. The Commission also noted that it had similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property. *Id.*, at 47-48.

The Nollans filed a supplemental petition for a writ of administrative mandamus with the Superior Court, in which they argued that imposition of the access condition violated the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. The Superior Court ruled in their favor on statutory grounds, finding, in part to avoid "issues of constitutionality," that the California Coastal Act of 1976, *Cal. Pub. Res. Code Ann. § 30000 et seq.* (West 1986), authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea. App. 419. In the court's view, the administrative record did not provide an adequate factual basis for concluding that replacement of the bungalow with the house would create a direct or cumulative burden on public access to the sea. *Id.*, at 416-417. Accordingly, the Superior Court granted the writ of mandamus and directed that the permit condition be struck.

The Commission appealed to the California Court of Appeal. While that appeal was pending, the Nollans satisfied [*830] the [**3145] condition on their option to purchase by tearing down the bungalow and building the new house, and bought the property. They did not notify the Commission that they were taking that action.

[***685] The Court of Appeal reversed the Superior Court. *177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986).* It disagreed with the Superior Court's interpretation of the Coastal Act, finding that it required that a coastal permit for the construction of a new house whose floor area, height or bulk was more than 10% larger than that of the house it was replacing be conditioned on a grant of access. *Id., at 723-724, 223 Cal. Rptr., at 31;* see *Cal. Pub. Res. Code Ann. § 30212.* It also ruled that that requirement did not violate the Constitution under the reasoning of an earlier case of the Court of Appeal, *Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).* In that case, the court had found that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional. *177 Cal. App. 3d, at 723, 223 Cal. Rptr., at 30-31;* see *Grupe, supra, at 165-168, 212 Cal. Rptr., at 587-590;* see also *Remmenga v. California Coastal Comm'n, 163 Cal. App. 3d 623, 628, 209 Cal. Rptr. 628, 631,* appeal dism'd, *474 U.S. 915 (1985).* The Court of Appeal ruled that the record established that that was the situation with respect to the Nollans' house. *177 Cal. App. 3d, at 722-723, 223 Cal. Rptr., at 30-31.* It ruled that the Nollans' taking claim also failed because, although the condition diminished the value of the Nollans' lot, it did not deprive them of all reasonable use of their property. *Id., at 723, 223 Cal. Rptr., at 30;* see *Grupe, supra, at 175-176, 212 Cal. Rptr., at 595-596.* Since, in the Court of Appeal's view, there was no statutory or constitutional obstacle to imposition [*831] of the access condition, the Superior Court erred in granting the writ of mandamus. The Nollans appealed to this Court, raising only the constitutional question.

II

[***LEdHR2] [2] [***LEdHR3] [3]Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does

not constitute the taking of a property interest but rather (as JUSTICE BRENNAN contends) "a mere restriction on its use," *post*, at 848-849, n. 3, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. J. Sackman, 1 Nichols on Eminent Domain § 2.1[1] (Rev. 3d ed. 1985), 2 *id.*, § 5.01[5]; see 1 *id.*, § 1.42[9], 2 *id.*, § 6.14. Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly [***686] held that, [HN1] as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)*, quoting *Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)*. In [**3146] *Loretto* we observed that [HN2] where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see *458 U.S., at 432-433, n. 9*, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public [*832] benefit or has only minimal economic impact on the owner," *id., at 434-435*. We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises. n1

n1 The holding of *PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)*, is not inconsistent with this analysis, since there the owner had already opened his property to the general public, and in addition permanent access was not required. The analysis of *Kaiser Aetna v. United States, 444 U.S. 164 (1979)*, is not inconsistent because it was affected by traditional doctrines regarding navigational servitudes. Of course neither of those cases involved, as this one does, a classic right-of-way easement.

[***LEdHR4] [4]JUSTICE BRENNAN argues that while this might ordinarily be the case, the California Constitution's prohibition on any individual's "exclu[ding] the right of way to [any navigable] water whenever it is required for any public purpose," Art. X, § 4, produces a different result here. *Post*, at 847-848, see also *post*, at 855, 857. There are a number of difficulties with that argument. Most obviously, the right of way sought here is not naturally described as one *to* navigable water (from the street to the sea) but *along* it; it is at least highly questionable whether the text of the California Constitution has any prima facie application to the situation before us. Even if it does, however, several [HN3] California cases suggest that JUSTICE BRENNAN's interpretation of the effect of the clause is erroneous, and that to obtain easements of access across private property the State must proceed through its eminent domain power. See *Bolsa Land Co.* v. *Burdick, 151 Cal. 254, 260, 90 P. 532, 534-535 (1907); Oakland v. Oakland Water Front Co., 118 Cal. 160, 185, 50 P. 277, 286 (1897); Heist v. County of Colusa, 163 Cal. App. 3d 841, 851, 213 Cal. Rptr. 278, 285 (1984); Aptos Seascape Corp.* v. *Santa Cruz, 138 Cal. App. 3d 484, 505-506, 188 Cal. Rptr. 191, 204-205 (1982)*. (None of these cases specifically addressed [*833] the argument that Art. X, § 4, allowed the public to cross private property to get to navigable water, but if that provision meant what JUSTICE BRENNAN believes, it is hard to see why it was not invoked.) See also 41 Op. Cal. Atty. Gen. 39, 41 (1963) ("In spite of the sweeping provisions of [Art. X, § 4], and the injunction therein to the Legislature to give its provisions [***687] the most liberal interpretation, the few reported cases in California have adopted the general rule that one may not trespass on private land to get to navigable tidewaters for the purpose of commerce, navigation or fishing"). In light of these uncertainties, and given the fact that, as JUSTICE BLACKMUN notes, the Court of Appeal did not rest its decision on Art. X, § 4, *post*, at 865, we should assuredly not take it upon ourselves to resolve this question of California constitutional law in the first instance. See, *e. g., Jenkins v. Anderson, 447 U.S. 231, 234, n. 1 (1980)*. That would be doubly inappropriate since the Commission did not advance this argument in the Court of Appeal, and the Nollans argued in the Superior Court that any claim that there was a preexisting public right of access had to be asserted through a quiet title action, see Points and Authorities in Support of Motion for Writ of Administrative Mandamus, No. SP50805 (Super. Ct. Cal.), p. 20, which the Commission, possessing no claim to the easement itself, probably would not have had standing under California law to bring. See [**3147] Cal. Code Civ. Proc. Ann. § 738 (West 1980). n2

n2 JUSTICE BRENNAN also suggests that the Commission's public announcement of its intention to condition the rebuilding of houses on the transfer of easements of access caused the Nollans to have "no reasonable claim to any expectation of being able to exclude members of the

public" from walking across their beach. *Post*, at 857-860. He cites our opinion in *Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)*, as support for the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights. In *Monsanto*, however, we found merely that the Takings Clause was not violated by giving effect to the Government's announcement that application for "*the right to [the] valuable Government benefit,*" *id., at 1007* (emphasis added), of obtaining registration of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application. *Id., at 1007-1008.* See also *Bowen* v. *Gilliard, ante*, at 605. But the right to build on one's own property -- even though its exercise can be subjected to legitimate permitting requirements -- cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange," *467 U.S., at 1007*, that we found to have occurred in *Monsanto*. Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

[*834]

[***LEdHR1B] [1B] [***LEdHR5] [5]Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome. We have long recognized that [HN4] land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," *Agins v. Tiburon, 447 U.S. 255, 260 (1980).* See also *Penn Central Transportation Co.* v. *New York City, 438 U.S. 104, 127 (1978)* ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" [***688] or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. n3 They have made clear, however, that a [*835] broad range of governmental purposes and regulations satisfies these requirements. See *Agins v. Tiburon, supra, at 260-262* (scenic zoning); *Penn Central Transportation Co.* v. *New York City, supra* (landmark preservation); *Euclid v. Ambler Realty Co., 272 U.S. 365* [**3148] *(1926)* (residential zoning); Laitos & Westfall, Government Interference with Private Interests in Public Resources, *11 Harv. Envtl. L. Rev. 1, 66 (1987).* The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so -- in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) n4 would substantially impede these purposes, [*836] unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking. See *Penn Central Transportation Co.* v. *New York City, supra.*

n3 Contrary to JUSTICE BRENNAN's claim, *post*, at 843, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon, 447 U.S. 255, 260 (1980),* not that "the State *'could rationally have decided'* that the measure adopted might achieve the State's objective." *Post*, at 843, quoting *Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981).* JUSTICE BRENNAN relies principally on an equal protection case, *Minnesota v. Clover Leaf Creamery Co., supra,* and two substantive due process cases, *Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-488 (1955),* and *Day-Brite Lighting, Inc.* v. *Missouri, 342 U.S. 421, 423 (1952),* in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical. *Goldblatt v. Hempstead, 369 U.S. 590 (1962),* does appear to assume that the inquiries are the same, but that assumption is in-

consistent with the formulations of our later cases.

n4 If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States, 364 U.S. 40, 49 (1960);* see also *San Diego Gas & Electric Co.* v. *San Diego, 450 U.S. 621, 656 (1981)* (BRENNAN, J., dissenting); *Penn Central Transportation Co.* v. *New York City, 438 U.S. 104, 123 (1978).* But that is not the basis of the Nollans' challenge here.

[***LEdHR1C] [1C]The Commission argues that a [***689] permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house -- for example, a height limitation, a width restriction, or a ban on fences -- so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the [*837] owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $ 100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $ 100 tax contribution in [**3149] order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." *J. E. D. Associates, Inc.* v. *Atkinson, 121 N. H. 581, 584, 432 A. 2d 12, 14-15 (1981);* see Brief for United States as *Amicus Curiae* 22, and n. 20. See also *Loretto v. Teleprompter Manhattan* [***690] *CATV Corp., 458 U.S., at 439, n. 17.* n5

n5 One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

[*838] III

[***LEdHR1D] [1D]The Commission claims that it concedes as much, and that we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards. The Commission's principal contention to the contrary essentially turns on a play on the word "access." The Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them [*839] caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes. n6 Our conclusion on this [***691] [**3150] point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts. See *Parks v. Watson, 716 F.2d 646, 651-653 (CA9 1983); Bethlehem Evangelical Lutheran Church v. Lakewood, 626 P. 2d 668, 671-674 (Colo. 1981); Aunt Hack Ridge Estates, Inc.* v. *Planning Comm'n, 160 Conn. 109, 117-120, 273 A. 2d 880, 885 (1970); Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. App. 1983); Pioneer Trust & Savings Bank v. Mount Prospect, 22 Ill. 2d 375, 380, 176 N. E. 2d 799, 802 (1961); Lampton v. Pinaire, 610 S. W. 2d 915, 918-919 (Ky. App. 1980); Schwing v. Baton Rouge, 249 So. 2d 304* (La. App.), application denied, *259 La. 770, 252 So. 2d 667 (1971); Howard County v. JJM, Inc., 301 Md. 256, 280-282, 482 A. 2d 908, 920-921 (1984); Collis v. Bloomington, 310 Minn. 5, 246 N. W. 2d 19 (1976); State ex rel. Noland v. St. Louis County, 478 S. W. 2d 363 (Mo. 1972);* [*840] *Billings Properties, Inc.* v. *Yellowstone County, 144 Mont. 25, 33-36, 394 P. 2d 182, 187-188 (1964); Simpson v. North Platte, 206 Neb. 240, 292 N. W. 2d 297 (1980); Briar West, Inc.* v. *Lincoln, 206 Neb. 172, 291 N. W. 2d 730 (1980); J. E. D. Associates v. Atkinson, 121 N. H. 581, 432 A. 2d 12 (1981); Longridge Builders, Inc.* v. *Planning Bd. of Princeton, 52 N. J. 348, 350-351, 245 A. 2d 336, 337-338 (1968); Jenad, Inc.* v. *Scarsdale, 18 N. Y. 2d 78, 218 N. E. 2d 673 (1966); MacKall v. White, 85 App. Div. 2d 696, 445 N. Y. S. 2d 486 (1981),* appeal denied, *56 N. Y. 2d 503, 435 N. E. 2d 1100 (1982); Frank Ansuini, Inc.* v. *Cranston, 107 R. I. 63, 68-69, 71, 264 A. 2d 910, 913, 914 (1970); College Station v. Turtle Rock Corp., 680 S. W. 2d 802, 807 (Tex. 1984); Call v. West Jordan, 614 P. 2d 1257, 1258-1259 (Utah 1980); Board of Supervisors of James City County v. Rowe, 216 Va. 128, 136-139, 216 S. E. 2d 199, 207-209 (1975); Jordan v. Menomonee Falls, 28 Wis. 2d 608, 617-618, 137 N. W. 2d 442, 447-449 (1965),* appeal dism'd, *385 U.S. 4 (1966).* See also *Littlefield v. Afton, 785 F.2d 596, 607 (CA8 1986);* Brief for National Association of Home Builders et al. as *Amici Curiae* 9-16.

> n6 As JUSTICE BRENNAN notes, the Commission also argued that the construction of the new house would "'increase private use immediately adjacent to public tidelands,'" which in turn might result in more disputes between the Nollans and the public as to the location of the boundary. *Post*, 851, quoting App. 62. That risk of boundary disputes, however, is inherent in the right to exclude others from one's property, and the construction here can no more justify mandatory dedication of a sort of "buffer zone" in order to avoid boundary disputes than can the construction of an addition to a single-family house near a public street. Moreover, a buffer zone has a boundary as well, and unless that zone is a "no-man's land" that is off limits for both neighbors (which is of course not the case here) its creation achieves nothing except to shift the location of the boundary dispute further on to the private owner's land. It is true that in the distinctive situation of the Nollans' property the seawall could be established as a clear demarcation of the public easement. But since not all of the lands to which this land-use condition applies have such a convenient reference point, the avoidance of boundary disputes is, even more obviously than the others, a made-up purpose of the regulation.

JUSTICE BRENNAN argues that imposition of the access requirement is not irrational. In his version of the Commission's argument, the reason for the requirement is that in its absence, a person looking toward the beach

from the road will see a street of residential structures including the Nollans' new home and conclude that there is no public beach nearby. If, however, that person sees people passing and repassing along the dry sand behind the Nollans' home, he will realize that there is a public beach somewhere in the vicinity. *Post*, at 849-850. The Commission's action, however, was based on the opposite factual finding that the wall of houses completely blocked the view of the beach and that a person looking from the road would not be able to see it at all. App. 57-59.

Even if the Commission had made the finding that JUSTICE BRENNAN proposes, however, it is not certain that it would [*841] suffice. We do not share JUSTICE BRENNAN's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," *post*, at 862, [***692] that will avoid the effect of today's decision. We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a [**3151] legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

We are left, then, with the Commission's justification for the access requirement unrelated to land-use regulation:

"Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment." App. 68.

That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," [*842] see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.

Reversed.

DISSENTBY:

BRENNAN; BLACKMUN; STEVENS

DISSENT:

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Appellants in this case sought to construct a new dwelling on their beach lot that would both diminish visual access to the beach and move private development closer to the public tidelands. The Commission reasonably concluded that such "buildout," both individually and cumulatively, threatens public access to the shore. It sought to offset this encroachment by obtaining assurance that the public may walk along the shoreline in order to gain access to the ocean. The Court finds this an illegitimate exercise of the police power, because it maintains that there is no reasonable relationship between the effect of the development and the condition imposed.

The first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century. Furthermore, even under the Court's cramped standard, the permit condition imposed in this case directly responds to the specific type of burden on access created by appellants' development. Finally, a [***693] review of those factors deemed most significant in takings analysis makes clear that the Commission's action implicates none of the concerns underlying the Takings Clause. The Court has thus struck down the Commission's reasonable effort to respond to intensified development along the California coast, on behalf of landowners who can make no claim that their reasonable expectations have been disrupted. The Court has, in short, given appellants a windfall at the expense of the public.

I

The Court's conclusion that the permit condition imposed on appellants is unreasonable cannot withstand analysis. First, the Court demands a degree of exactitude that is inconsistent [*843] with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens. Second, even if the nature of the public-access condition imposed must be identical to the precise burden on access created by appellants, this requirement is plainly satisfied.

A

There can be no dispute that the police power of the States encompasses the authority to impose conditions on private development. [**3152] See, *e. g., Agins v. Tiburon, 447 U.S. 255 (1980); Penn Central Transportation Co.* v. *New York City, 438 U.S. 104 (1978); Gorieb v. Fox, 274 U.S. 603 (1927).* It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State "*could rationally have decided*" that the measure adopted might achieve the State's objective. *Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)* (emphasis in original). n1 In this case, [***694] California has [*844] employed its police power in order to condition development upon preservation of public access to the ocean and tidelands. The Coastal Commission, if it had so chosen, could have denied [*845] the Nollans' request for a development [**3153] permit, since the property would have remained economically viable without the requested new development. n2 Instead, the State sought to accommodate the Nollans' desire for new development, on the condition that the development not diminish the overall amount of public access to the coastline. Appellants' proposed development would reduce public access by restricting visual access to the beach, by contributing to an increased need for community facilities, and by moving private development closer to public beach property. The Commission sought to offset this diminution in access, and thereby preserve the overall balance of access, by requesting a deed restriction that would ensure "lateral" access: the right of the public to pass and repass along the dry sand parallel to the shoreline in order to reach [***695] the tidelands and the ocean. In the expert opinion of the Coastal Commission, development conditioned on such a restriction would fairly attend to both public and private interests.

n1 See also *Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-488 (1955)* ("The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); *Day-Brite Lighting, Inc.* v. *Missouri, 342 U.S. 421, 423 (1952)* ("Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . . State legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare").

Notwithstanding the suggestion otherwise, *ante*, at 834-835, n. 3, our standard for reviewing the threshold question whether an exercise of the police power is legitimate is a uniform one. As we stated over 25 years ago in addressing a takings challenge to government regulation:

"The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in *Lawton v. Steele, 152 U.S. 133, 137 (1894),* is still valid today: . . . "It must appear, first, that the interests of the public . . . require [government] interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature . . . .' *E. g., Sproles v. Binford, 286 U.S. 374, 388 (1932)." Goldblatt v. Hempstead, 369 U.S. 590, 594-595 (1962).*

See also *id., at 596* (upholding regulation from takings challenge with citation to, *inter alia, United States v. Carolene Products Co., 304 U.S. 144, 154 (1938),* for proposition that exercise of police power will be upheld if "any state of facts either known or which could be reasonably assumed affords support for it"). In *Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211 (1986),* for instance, we reviewed a takings challenge to statutory provisions that had been held to be a legitimate exercise of the police power under due process analysis in *Pension Benefit Guaranty Corporation v. R. A. Gray & Co., 467 U.S. 717 (1984). Gray*, in turn, had relied on *Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).* In rejecting the takings argument that the provisions were not within Congress' regulatory power, the Court in *Connolly* stated: "Although both *Gray* and *Turner Elkhorn* were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved." *475 U.S., at 223.* Our phraseology may differ slightly from case to case -- *e. g.*, regulation must "substantially advance," *Agins v. Tiburon, 447 U.S. 255, 260 (1980),* or be "reasonably necessary to," *Penn Central Transportation Co.* v. *New York City, 438 U.S. 104,*

127 (1978), the government's end. These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.

Of course, government action may be a valid exercise of the police power and still violate specific provisions of the Constitution. JUSTICE SCALIA is certainly correct in observing that challenges founded upon these provisions are reviewed under different standards. *Ante*, at 834-835, n. 3. Our consideration of factors such as those identified in *Penn Central, supra,* for instance, provides an analytical framework for protecting the values underlying the Takings Clause, and other distinctive approaches are utilized to give effect to other constitutional provisions. This is far different, however, from the use of different standards of review to address the threshold issue of the rationality of government action.

n2 As this Court declared in *United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985):*

"A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."

We also stated in *Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979),* with respect to dredging to create a private marina:

"We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation."

The Court finds fault with this measure because it regards the condition as insufficiently tailored to address the precise [*846] type of reduction in access produced by the new development. The Nollans' development blocks visual access, the Court tells us, while the Commission seeks to preserve lateral access along the coastline. Thus, it concludes, the State acted irrationally. Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government." *Sproles v. Binford, 286 U.S. 374, 388 (1932).* Cf. *Keystone Bituminous Coal Assn.* v. *DeBenedictis, 480 U.S. 470, 491, n. 21 (1987)* ("The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received"). As this Court long ago declared with regard to various forms of restriction on the use of property:

"Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." *Gorieb, 274 U.S., at 608* (citations omitted).

[**3154] The Commission is charged by both the State Constitution and legislature to preserve overall public access to the California coastline. Furthermore, by virtue of its participation in the Coastal Zone Management Act (CZMA) program, the [*847] State must "exercise effectively [its] responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone," *16 U. S. C. § 1452*(2), so as to provide for, *inter alia*, "public access to the coas[t] for recreation purposes." § 1452(2)(D). The Commission has sought to discharge its responsibilities in a flexible manner. It has sought to balance private and public interests and to accept tradeoffs: to permit development that reduces access in some ways as long as other means of access are enhanced. In this case, it has determined that the Nollans' burden on access would be offset by a deed restriction that formalizes the public's right to pass along the shore. In its informed judgment, such a tradeoff would preserve the net amount of public access to the coastline. The [***696] Court's insistence

on a precise fit between the forms of burden and condition on each individual parcel along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate.

The Court's demand for this precise fit is based on the assumption that private landowners in this case possess a reasonable expectation regarding the use of their land that the public has attempted to disrupt. In fact, the situation is precisely the reverse: it is private landowners who are the interlopers. The public's expectation of access considerably antedates any private development on the coast. Article X, § 4, of the California Constitution, adopted in 1879, declares:

"No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so [*848] that access to the navigable waters of this State shall always be attainable for the people thereof."

It is therefore private landowners who threaten the disruption of settled public expectations. Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose. In this case, however, the State has sought to protect *public* expectations of access from disruption by private land use. The State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens.

Congress expressly stated in passing the CZMA that "in light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate." *16 U. S. C. § 1451*(h). It is thus puzzling that the Court characterizes as a "non-land-use justification," *ante*, at 841, the exercise of the police power to "'provide continuous public access along Faria Beach as the lots undergo development or redevelopment.'" *Ibid.* (quoting App. 68). The Commission's determination that certain types of development jeopardize public access to the ocean, and that such development should be conditioned on preservation of access, is the essence of responsible land-use planning. The Court's use of an unreasonably demanding standard for determining the rationality of state regulation in this area thus could hamper innovative efforts to [**3155] preserve an increasingly fragile national resource. n3

n3 The list of cases cited by the Court as support for its approach, *ante*, at 839-840, includes no instance in which the State sought to vindicate preexisting rights of access to navigable water, and consists principally of cases involving a requirement of the dedication of land as a condition of subdivision approval. Dedication, of course, requires the surrender of ownership of property rather than, as in this case, a mere restriction on its use. The only case pertaining to beach access among those cited by the Court is *MacKall v. White, 85 App. Div. 2d 696, 445 N. Y. S. 2d 486 (1981).* In that case, the court found that a subdivision application could not be conditioned upon a declaration that the landowner would not hinder the public from using a trail that had been used to gain access to a bay. The trail had been used despite posted warnings prohibiting passage, and despite the owner's resistance to such use. In that case, unlike this one, neither the State Constitution, state statute, administrative practice, nor the conduct of the landowner operated to create any reasonable expectation of a right of public access.

[*849] B

[***697] Even if we accept the Court's unusual demand for a precise match between the condition imposed and the specific type of burden on access created by the appellants, the State's action easily satisfies this requirement. First, the lateral access condition serves to dissipate the impression that the beach that lies behind the wall of homes along the shore is for private use only. It requires no exceptional imaginative powers to find plausible the Commission's point that the average person passing along the road in front of a phalanx of imposing permanent residences, including the appellants' new home, is likely to conclude that this particular portion of the shore is not open to the public. If, however, that person can see that numerous people are passing and repassing along the dry sand, this conveys the message that the beach is in fact open for use by the public. Furthermore, those persons who go down to the public beach a quarter-mile away will be able to look down the coastline and see that persons have continuous access to the tidelands, and will observe signs that proclaim the public's right of access over the dry sand. The burden produced by the diminution in visual access -- the impression that the

beach is not open to the public -- is thus directly alleviated by the provision for public access over the dry sand. The Court therefore has an [*850] unrealistically limited conception of what measures could reasonably be chosen to mitigate the burden produced by a diminution of visual access.

The second flaw in the Court's analysis of the fit between burden and exaction is more fundamental. The Court assumes that the only burden with which the Coastal Commission was concerned was blockage of visual access to the beach. This is incorrect. n4 The Commission specifically stated in its report in support of the permit condition that "the Commission finds that the applicants' proposed development would present an increase in view blockage, *an increase in private use of the shorefront*, and that this impact would burden the public's ability to traverse to and along the shorefront." App. 65-66 (emphasis added). It declared that the possibility that "the public may get the impression that the beachfront is no longer [***698] available for public use" would be "due to *the encroaching nature of private use immediately adjacent to the public use, as well as* the visual 'block' of increased residential build-out impacting the visual quality of the beachfront." *Id.*, at 59 (emphasis added).

n4 This may be because the State in its briefs and at argument contended merely that the permit condition would serve to preserve overall public access, by offsetting the diminution in access resulting from the project, such as, *inter alia*, blocking the public's view of the beach. The State's position no doubt reflected the reasonable assumption that the Court would evaluate the rationality of its exercise of the police power in accordance with the traditional standard of review, and that the Court would not attempt to substitute its judgment about the best way to preserve overall public access to the ocean at the Faria Family Beach Tract.

The record prepared by the Commission is replete with references to the threat to [**3156] public access along the coastline resulting from the seaward encroachment of private development along a beach whose mean high-tide line is constantly shifting. As the Commission observed in its report: "The Faria Beach shoreline fluctuates during the year depending on the seasons and accompanying storms, and the public is not always able to traverse the shoreline below the mean [*851] high tide line." *Id.*, at 67. As a result, the boundary between publicly owned tidelands and privately owned beach is not a stable one, and "the existing seawall is located very near to the mean high water line." *Id.*, at 61. When the beach is at its largest, the seawall is about 10 feet from the mean high-tide mark; "during the period of the year when the beach suffers erosion, the mean high water line appears to be located either on or beyond the existing seawall." *Ibid.* Expansion of private development on appellants' lot toward the seawall would thus "increase private use immediately adjacent to public tidelands, which has the potential of causing adverse impacts on the public's ability to traverse the shoreline." *Id.*, at 62. As the Commission explained:

"The placement of more private use adjacent to public tidelands has the potential of creating use conflicts between the applicants and the public. The results of new private use encroachment into boundary/buffer areas between private and public property can create situations in which landowners intimidate the public and seek to prevent them from using public tidelands because of disputes between the two parties over where the exact boundary between private and public ownership is located. If the applicants' project would result in further seaward encroachment of private use into an area of clouded title, new private use in the subject encroachment area could result in use conflict between private and public entities on the subject shorefront." *Id.*, at 61-62.

The deed restriction on which permit approval was conditioned would directly address this threat to the public's access to the tidelands. It would provide a formal declaration of the public's right of access, thereby ensuring that the shifting character of the tidelands, and the presence of private development immediately adjacent to it, would not jeopardize [*852] enjoyment of that right. n5 The imposition of the permit condition was therefore directly related to the fact that appellants' development [***699] would be "located along a unique stretch of coast where lateral public access is inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline." *Id.*, at 68. The deed restriction was crafted to deal with the particular character of the beach along which appellants sought to build, and with the specific problems created by expansion of development toward the public tidelands. In imposing the restriction, the State sought to ensure that such development would not disrupt the historical expectation of the public regarding access to the sea. n6

n5 As the Commission's Public Access (Shoreline) Interpretative Guidelines state:

"The provision of lateral access recognizes the potential for conflicts between public and private use and creates a type of access that allows the public to move freely along all the tidelands in an area that can be clearly delineated and distinguished from private use areas. . . . Thus the 'need' determination set forth in P[ublic] R[esources] C[ode] 30212(a)(2) should be measured in terms of providing access that buffers public access to the tidelands from the burdens generated on access by private development." App. 358-359.

n6 The Court suggests that the risk of boundary disputes "is inherent in the right to exclude others from one's property," and thus cannot serve as a purpose to support the permit condition. *Ante*, at 839, n. 6. The Commission sought the deed restriction, however, not to address a generalized problem inherent in any system of property, but to address the *particular* problem created by the shifting high-tide line along Faria Beach. Unlike the typical area in which a boundary is delineated reasonably clearly, the very problem on Faria Beach is that the boundary is *not* constant. The area open to public use therefore is frequently in question, and, as the discussion, *supra*, demonstrates, the Commission clearly tailored its permit condition precisely to address this specific problem.

The Court acknowledges that the Nollans' seawall could provide "a clear demarcation of the public easement," and thus avoid merely shifting "the location of the boundary dispute further on to the private owner's land." *Ibid.* It nonetheless faults the Commission because every property subject to regulation may not have this feature. This case, however, is a challenge to the permit condition *as applied to the Nollans' property*, so the presence or absence of seawalls on other property is irrelevant.

[*853] [**3157] The Court is therefore simply wrong that there is no reasonable relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development. Even were the Court desirous of assuming the added responsibility of closely monitoring the regulation of development along the California coast, this record reveals rational public action by any conceivable standard.

II

The fact that the Commission's action is a legitimate exercise of the police power does not, of course, insulate it from a takings challenge, for when "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon, 260 U.S. 393, 415 (1922).* Conventional takings analysis underscores the implausibility of the Court's holding, for it demonstrates that this exercise of California's police power implicates none of the concerns that underlie our takings jurisprudence.

In reviewing a Takings Clause claim, we have regarded as particularly significant the nature of the governmental action and the economic impact of regulation, especially the extent to which regulation interferes with investment-backed expectations. *Penn Central, 438 U.S., at 124.* The character of the government action in this case is the imposition of a condition on permit approval, which allows the public to continue to have access to the coast. The physical intrusion permitted by the deed restriction is minimal. The public is permitted the right to pass and repass along the coast in an area from the seawall to the mean high-tide mark. App. 46. This area is at its [***700] *widest* 10 feet, *id.*, at 61, which means that *even without the permit condition*, the public's right of access permits it to pass on average within a few feet of the seawall. Passage closer to the 8-foot-high rocky seawall will make the [*854] appellants even less visible to the public than passage along the high-tide area farther out on the beach. The intrusiveness of such passage is even less than the intrusion resulting from the required dedication of a sidewalk in front of private residences, exactions which are commonplace conditions on approval of development. n7 Furthermore, the high-tide line shifts throughout the year, moving up to and beyond the seawall, so that public passage for a portion of the year would either be impossible or would not occur on appellant's property. Finally, although the Commission had the authority to provide for either passive or active recreational use of the property, it chose the least intrusive alternative: a mere right to pass and repass. *Id.*, at 370. n8 [**3158] As this Court made [*855] clear in *PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980),* physical access to private property in itself creates no takings problem if it does not "unreasonably impair the value or use of [the] property." Appellants can make no tenable claim that either their enjoyment of their property or its value is diminished by the public's ability merely to pass and repass a few feet closer to the seawall beyond which appellants' house is located.

n7 See, *e. g., Bellefontaine Neighbors v. J. J. Kelley Realty & Bldg. Co., 460 S. W. 2d 298 (Mo. Ct. App. 1970); Allen v. Stockwell, 210 Mich. 488, 178 N. W. 27 (1920).* See generally Shultz & Kelley, Subdivision Improvement Requirements

and Guarantees: A Primer, 28 Wash. U. J. Urban and Contemp. L. 3 (1985).

n8 The Commission acted in accordance with its Guidelines both in determining the width of the area of passage, and in prohibiting any recreational use of the property. The Guidelines state that it may be necessary on occasion to provide for less than the normal 25-foot-wide accessway along the dry sand when this may be necessary to "protect the privacy rights of adjacent property owners." App. 363. They also provide this advice in selecting the type of public use that may be permitted:

"*Pass and Repass.* Where topographic constraints of the site make use of the beach dangerous, where habitat values of the shoreline would be adversely impacted by public use of the shoreline or where the accessway may encroach closer than 20 feet to a residential structure, the accessway may be limited to the right of the public to pass and repass along the access area. For the purposes of these guidelines, pass and repass is defined as the right to walk and run along the shoreline. This would provide for public access along the shoreline but would not allow for any additional use of the accessway. Because this severely limits the public's ability to enjoy the adjacent state owned tidelands by restricting the potential use of the access areas, this form of access dedication should be used only where necessary to protect the habitat values of the site, where topographic constraints warrant the restriction, or where it is necessary to protect the privacy of the landowner." *Id.*, at 370.

PruneYard is also relevant in that we acknowledged in that case that public access rested upon a "state constitutional . . . provision that had been construed to create rights to the use of private property by strangers." *Id.*, at 81. In this case, of course, the State is also acting to protect a state constitutional right. See *supra*, at 847-848 (quoting Art. X, § 4, of California Constitution). The constitutional provision guaranteeing public access to the ocean states that "the Legislature shall enact such laws as will give *the most liberal construction* [***701] *to this provision* so that access to the navigable waters of this State shall be always attainable for the people thereof." Cal. Const., Art. X, § 4 (emphasis added). This provision is the explicit basis for the statutory directive to provide for public access along the coast in new development projects, *Cal. Pub. Res. Code Ann. § 30212* (West 1986), and has been construed by the state judiciary to permit passage over private land where necessary to gain access to the tidelands. *Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 171-172, 212 Cal. Rptr. 578, 592-593 (1985).* The physical access to the perimeter of appellants' property at issue in this case thus results directly from the State's enforcement of the State Constitution.

Finally, the character of the regulation in this case is not unilateral government action, but a condition on approval of a development request submitted by appellants. The State has not sought to interfere with any preexisting property interest, but has responded to appellants' proposal to intensify development on the coast. Appellants themselves chose to [*856] submit a new development application, and could claim no property interest in its approval. They were aware that approval of such development would be conditioned on preservation of adequate public access to the ocean. The State has initiated no action against appellants' property; had the Nollans' not proposed more intensive development in the coastal zone, they would never have been subject to the provision that they challenge.

Examination of the economic impact of the Commission's action reinforces the conclusion that no taking has occurred. Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a "reciprocity of advantage." *Pennsylvania Coal, 260 U.S., at 415.* Appellants have been allowed to replace a one-story, 521-square-foot beach home with a two-story, 1,674-square-foot residence and an attached two-car garage, resulting in development covering 2,464 square feet of the lot. Such development obviously significantly increases the value of appellants' property; appellants make no contention that this increase is offset by any diminution in value resulting from the deed restriction, much less that the restriction made the property less valuable than it would have been without the new construction. Furthermore, appellants gain an additional benefit from the Commission's permit [**3159] condition program. They are able to walk along the beach beyond the confines of their own property only because the Commission has required deed restrictions as a condition of approving other new beach developments. n9 Thus, appellants benefit both as private landowners and as members of the public from the fact that new development permit requests are conditioned on preservation of public access.

n9 At the time of the Nollans' permit application, 43 of the permit requests for development along the Faria Beach had been conditioned on

deed restrictions ensuring lateral public access along the shoreline. App. 48.

[*857] Ultimately, appellants' claim of economic injury is flawed because it rests on the assumption of entitlement [***702] to the full value of their new development. Appellants submitted a proposal for more intensive development of the coast, which the Commission was under no obligation to approve, and now argue that a regulation designed to ameliorate the impact of that development deprives them of the full value of their improvements. Even if this novel claim were somehow cognizable, it is not significant. "The interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus v. Allard, 444 U.S. 51, 66 (1979).*

With respect to appellants' investment-backed expectations, appellants can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean. It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights. "As a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes v. Washington, 389 U.S. 290, 295 (1967)* (Stewart, J., concurring). See also *Borax Consolidated, Ltd.* v. *Los Angeles, 296 U.S. 10, 22 (1935)* ("Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law"). In this case, the State Constitution explicitly states that no one possessing the "frontage" of any "navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose." Cal. Const., Art. X, § 4. The state Code expressly provides that, save for exceptions not relevant here, "public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects." *Cal. Pub. Res. Code Ann. § 30212* (West 1986). The Coastal Commission Interpretative Guidelines make clear that fulfillment of the Commission's constitutional and statutory duty [*858] requires that approval of new coastline development be conditioned upon provisions ensuring lateral public access to the ocean. App. 362. At the time of appellants' permit request, the Commission had conditioned all 43 of the proposals for coastal new development in the Faria Family Beach Tract on the provision of deed restrictions ensuring lateral access along the shore. *Id., at 48.* Finally, the Faria family had leased the beach property since the early part of this century, and "the Faria family and their lessees [including the Nollans] had not interfered with public use of the beachfront within the Tract, so long as public use was limited to pass and repass lateral access along the shore." *Ibid.* California therefore has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights, and appellants have never acted as if it were. Given this state of affairs, appellants cannot claim that the deed restriction has deprived them of a reasonable expectation to exclude from their property persons desiring to gain access to the sea.

Even were we somehow to concede a pre-existing expectation of a right to exclude, appellants were clearly on notice [**3160] when requesting a new development permit that a condition [***703] of approval would be a provision ensuring public lateral access to the shore. Thus, they surely could have had no expectation that they could obtain approval of their new development and exercise any right of exclusion afterward. In this respect, this case is quite similar to *Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).* In *Monsanto*, the respondent had submitted trade data to the Environmental Protection Agency (EPA) for the purpose of obtaining registration of certain pesticides. The company claimed that the agency's disclosure of certain data in accordance with the relevant regulatory statute constituted a taking. The Court conceded that the data in question constituted property under state law. It also found, however, that certain of the data had been submitted to the agency after Congress had [*859] made clear that only limited confidentiality would be given data submitted for registration purposes. The Court observed that the statute served to inform Monsanto of the various conditions under which data might be released, and stated:

"If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission." *Id., at 1006-1007.*

The Court rejected respondent's argument that the requirement that it relinquish some confidentiality imposed an unconstitutional condition on receipt of a Government benefit:

"As long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." *Id., at 1007.*

The similarity of this case to *Monsanto* is obvious. Appellants were aware that stringent regulation of development along the California coast had been in place at least since 1976. The specific deed restriction to which the Commission sought to subject them had been imposed since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract. App. 48. Such regulation to ensure public access to the ocean had been directly authorized by California citizens in 1972, and reflected their judgment that restrictions on coastal development represented "'the advantage of living and doing business in a civilized community.'" *Andrus v. Allard, supra, at 67,* quoting *Pennsylvania Coal Co.* v. *Mahon, 260 U.S., at 422* (Brandeis, J., dissenting). The deed restriction was "authorized by law at the [*860] time of [appellants' permit] submission," *Monsanto, supra, at 1007,* and, as earlier analysis demonstrates, *supra,* at 849-853, was reasonably related to the objective of ensuring public access. Appellants thus were on notice that new developments would be approved only if provisions were made [***704] for lateral beach access. In requesting a new development permit from the Commission, they could have no reasonable expectation of, and had no entitlement to, approval of their permit application without any deed restriction ensuring public access to the ocean. As a result, analysis of appellants' investment-backed expectations reveals that "the force of this factor is so overwhelming . . . that it disposes of the taking question." *Monsanto, supra, at 1005.* n10

n10 The Court suggests that *Ruckelshaus* v. *Monsanto* is distinguishable, because government regulation of property in that case was a condition on receipt of a "government benefit," while here regulation takes the form of a restriction on "the right to build on one's own property," which "cannot remotely be described as a 'government benefit.'" *Ante*, at 834, n. 2. This proffered distinction is not persuasive. Both Monsanto and the Nollans hold property whose use is subject to regulation; Monsanto may not sell its property without obtaining government approval and the Nollans may not build new development on their property without government approval. Obtaining such approval is as much a "government benefit" for the Nollans as it is for Monsanto. If the Court is somehow suggesting that "the right to build on one's own property" has some privileged natural rights status, the argument is a curious one. By any traditional labor theory of value justification for property rights, for instance, see, *e. g.*, J. Locke, The Second Treatise of Civil Government 15-26 (E. Gough, ed. 1947), Monsanto would have a superior claim, for the chemical formulae which constitute its property only came into being by virtue of Monsanto's efforts.

[**3161] Standard Takings Clause analysis thus indicates that the Court employs its unduly restrictive standard of police power rationality to find a taking where neither the character of governmental action nor the nature of the private interest affected raise any takings concern. The result is that the Court invalidates regulation that represents a reasonable adjustment [*861] of the burdens and benefits of development along the California coast.

III

The foregoing analysis makes clear that the State has taken no property from appellants. Imposition of the permit condition in this case represents the State's reasonable exercise of its police power. The Coastal Commission has drawn on its expertise to preserve the balance between private development and public access, by requiring that any project that intensifies development on the increasingly crowded California coast must be offset by gains in public access. Under the normal standard for review of the police power, this provision is eminently reasonable. Even accepting the Court's novel insistence on a precise *quid pro quo* of burdens and benefits, there is a reasonable relationship between the public benefit and the burden created by appellants' development. The movement of development closer to the ocean creates the prospect of encroachment on public tidelands, because of fluctuation in the mean high-tide line. The deed restriction ensures that disputes about the boundary between private and public property will not deter the public from exercising its right to have access to the sea.

Furthermore, consideration of the Commission's action under traditional takings analysis underscores the absence of any viable takings claim. The deed restriction permits the public only to pass and repass along a narrow strip of beach, a few feet closer to a seawall at the periphery [***705] of appellants' property. Appellants almost surely have enjoyed an increase in the value of their property even with the restriction, because they have been allowed to build a significantly larger new home with garage on their lot. Finally, appellants can claim the disruption of no expectation interest, both because they have no right to exclude the public under state law, and because, even if they did, they had full advance notice that new development along the coast is conditioned on provisions for continued public access to the ocean.

[*862] Fortunately, the Court's decision regarding this application of the Commission's permit program will probably have little ultimate impact either on this parcel in particular or the Commission program in general. A

preliminary study by a Senior Lands Agent in the State Attorney General's Office indicates that the portion of the beach at issue in this case likely belongs to the public. App. 85. n11 Since a full study had not been completed at the time of appellants' permit application, the deed restriction was requested "without regard to the possibility that the applicant is proposing development on public land." *Id.*, at 45. Furthermore, analysis by the same Lands Agent also indicated that the public [**3162] had obtained a prescriptive right to the use of Faria Beach from the seawall to the ocean. *Id.*, at 86. n12 The Superior Court explicitly stated in its ruling against the Commission on the permit condition issue that "no part of this opinion is intended to foreclose the public's opportunity to adjudicate the possibility that public rights in [appellants'] beach have been acquired through prescriptive use." *Id.*, at 420.

n11 The Senior Lands Agent's report to the Commission states that "based on my observations, presently, most, if not all of Faria Beach waterward of the existing seawalls [lies] *below* the Mean High Tide Level, and would fall in public domain or sovereign category of ownership." App. 85 (emphasis added).

n12 The Senior Lands Agent's report stated:

"Based on my past experience and my investigation to date of this property it is my opinion that the area seaward of the revetment at 3822 Pacific Coast Highway, Faria Beach, as well as all the area seaward of the revetments built to protect the Faria Beach community, if not public owned, has been impliedly dedicated to the public for passive recreational use." *Id.*, at 86.

With respect to the permit condition program in general, the Commission should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access produced by new development. Neither the Commission in its report nor the State in its briefs and at argument highlighted the particular threat to lateral access created by appellants' [*863] development project. In defending its action, the State emphasized the general point that *overall* access to the beach had been preserved, since the diminution of access created by the project had been offset by the gain in lateral access. This approach is understandable, given that the State relied on the reasonable assumption that its action was justified under the normal standard of review for determining legitimate exercises of a State's police power. In the future, alerted to the Court's apparently more demanding requirement, it need only make clear that a provision for public access directly responds to a particular type of burden on access created by a new development. [***706] Even if I did not believe that the record in this case satisfies this requirement, I would have to acknowledge that the record's documentation of the impact of coastal development indicates that the Commission should have little problem presenting its findings in a way that avoids a takings problem.

Nonetheless it is important to point out that the Court's insistence on a precise accounting system in this case is insensitive to the fact that increasing intensity of development in many areas calls for farsighted, comprehensive planning that takes into account both the interdependence of land uses and the cumulative impact of development. n13 As one scholar has noted:

"Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is [*864] more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing. Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user." Sax, Takings, Private Property, and Public Rights, *81 Yale L. J. 149, 152 (1971)* (footnote omitted).

As Congress has declared: "The key to more effective protection and use of the land and water resources of the coastal zone [is for the states to] develo[p] land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance." *16 U. S. C.* [**3163] *§ 1451*(i). This is clearly a call for a focus on the overall impact of development on coastal areas. State agencies therefore require considerable flexibility in responding to private desires for development in a way that guarantees the preservation of public access to the coast. They should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substituting its own narrow view of how this balance should be struck. Its reasoning is hardly suited to the complex reality of natural resource protection in the 20th century. I can only hope that today's decision is an aberration, and that a broader vision ultimately prevails. n14

n13 As the California Court of Appeal noted in 1985: "Since 1972, permission has been granted to construct more than 42,000 building units within the land jurisdiction of the Coastal Commission. In addition, pressure for development along the coast is expected to incerase since approximately 85% of California's population lives within 30 miles of the coast." *Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 167, n. 12, 212 Cal. Rptr. 578, 589, n. 12.* See also Coastal Zone Management Act, *16 U. S. C. § 1451*(c) (increasing demands on coastal zones "have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion").

n14 I believe that States should be afforded considerable latitude in regulating private development, without fear that their regulatory efforts will often be found to constitute a taking. "*If* . . . regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,'" however, I believe that compensation is the appropriate remedy for this constitutional violation. *San Diego Gas & Electric Co.* v. *San Diego, 450 U.S. 621, 656 (1981)* (BRENNAN, J., dissenting) (emphasis added). I therefore see my dissent here as completely consistent with my position in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987).*

I [***707] dissent.

[*865] JUSTICE BLACKMUN, dissenting.

I do not understand the Court's opinion in this case to implicate in any way the public-trust doctrine. The Court certainly had no reason to address the issue, for the Court of Appeal of California did not rest its decision on Art. X, § 4, of the California Constitution. Nor did the parties base their arguments before this Court on the doctrine.

I disagree with the Court's rigid interpretation of the necessary correlation between a burden created by development and a condition imposed pursuant to the State's police power to mitigate that burden. The land-use problems this country faces require creative solutions. These are not advanced by an "eye for an eye" mentality. The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based. See, *e. g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981).* In my view, the easement exacted from appellants and the problems their development created are adequately related to the governmental interest in providing public access to the beach. Coastal development by its very nature makes public access to the shore generally more difficult. Appellants' structure is part of that general development and, in particular, it diminishes the public's visual access to the ocean and decreases the public's sense that it may have physical access to the beach. These losses in access can be counteracted, at least in part, by the condition on appellants' construction permitting public passage that ensures access along the beach.

Traditional takings analysis compels the conclusion that there is no taking here. The governmental action is a valid exercise of the police power, and, so far as the record reveals, [*866] has a nonexistent economic effect on the value of appellants' property. No investment-backed expectations were diminished. It is significant that the Nollans had notice of the easement before they purchased the property and that public use of the beach had been permitted for decades.

For these reasons, I respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The debate between the Court and JUSTICE BRENNAN illustrates an extremely important point concerning government regulation of the use of privately owned [**3164] real estate. Intelligent, well-informed public officials may in good faith disagree about the validity of specific types of land-use regulation. Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence. Yet, because of the Court's remarkable ruling in *First English Evangelical Lutheran Church of Glendale v. Los Angeles* [***708] *County, 482 U.S. 304 (1987),* local governments and officials must pay the price for the necessarily vague standards in this area of the law.

In his dissent in *San Diego Gas & Electric Co.* v. *San Diego, 450 U.S. 621 (1981),* JUSTICE BRENNAN proposed a brand new constitutional rule. * He argued that a mistake such as the one that a majority of the Court believes that the California Coastal Commission made in this case should automatically give rise to pecuniary liability for a "temporary taking." *Id., at 653-661.* Notwithstanding the unprecedented chilling effect that such a rule will obviously have on public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment

[*867] and the public welfare, six Members of the Court recently endorsed JUSTICE BRENNAN's novel proposal. See *First English Evangelical Lutheran Church, supra.*

> * "The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." *450 U.S., at 658.*

I write today to identify the severe tension between that dramatic development in the law and the view expressed by JUSTICE BRENNAN's dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. See *ante*, at 846-848. I like the hat that JUSTICE BRENNAN has donned today better than the one he wore in *San Diego*, and I am persuaded that he has the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and the one after that. As this case demonstrates, the rule of liability created by the Court in *First English* is a shortsighted one. Like JUSTICE BRENNAN, I hope that "a broader vision ultimately prevails." *Ante*, at 864.

I respectfully dissent.

REFERENCES: Return To Full Text Opinion
Go to Supreme Court Briefs Go to Oral Argument Transcript

26 Am Jur 2d, Eminent Domain 157- 169

7 Federal Procedure, L Ed, Condemnation of Property 14:1-14:3

4 Am Jur Proof of Facts 649, Eminent Domain; 10 Am Jur Proof of Facts 2d 59, Eminent Domain: Lack of Necessity for Taking Property

USCS, Constitution, Amendment 5

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Index to Annotations, Eminent Domain

Annotation References:

Supreme Court's views as to what constitutes "taking," within meaning of Fifth Amendment's prohibition against taking of private property for public use without just compensation. *89 L Ed 2d 977.*

Supreme Court's views as to constitutionality of residential zoning restrictions. *52 L Ed 2d 863.*

EXHIBIT C

LEXSEE 438 US 234

ALLIED STRUCTURAL STEEL CO. v. SPANNAUS, ATTORNEY GENERAL OF MINNESOTA, ET AL.

No. 77-747

SUPREME COURT OF THE UNITED STATES

438 U.S. 234; 98 S. Ct. 2716; 57 L. Ed. 2d 727; 1978 U.S. LEXIS 130; 1 Employee Benefits Cas. (BNA) 1477

April 25, 1978, Argued
June 28, 1978, Decided

SUBSEQUENT HISTORY:

Petition For Rehearing Denied October 2, 1978.

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

DISPOSITION:

449 F.Supp. 644, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employer filed an action for injunctive and declaratory relief and claimed that the Private Pension Benefits Protection Act (Act), *Minn. Stat. 181B.01* et seq., unconstitutionally impaired the employer's contractual obligations to its employees under its pension agreement. The United States District Court for the District of Minnesota upheld the constitutional validity of the Act as applied to the employer. The employer appealed.

OVERVIEW: Pursuant to the Act, the State assessed a pension funding charge against the employer because it closed one of its offices and several of the discharged employees did not have vested pension rights under the employer's pension plan. The Court reversed the judgment that upheld the validity of the Act. As applied to the employer, the Act violated the Contract Clause because it operated as a substantial impairment of a contractual relationship. The Court noted that the State's police power was limited when its exercise effected substantial modifications of private contracts. The Act did not possess the attributes of the state laws that in the past had survived challenge under the Contract Clause. It was not enacted to deal with a broad, generalized economic or social problem. It invaded an area never before subject to regulation by the State. It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in the relationships, irrevocably and retroactively. Its narrow aim was leveled only at employers who voluntarily agreed to establish pension plans for their employees.

OUTCOME: The Court reversed the district court's judgment that upheld the constitutional validity of the Act as applied to the employer.

LexisNexis(R) Headnotes

Pensions & Benefits Law > Single-Employer Plans
[HN1] *Minn. Stat. § 181B.04.*

Constitutional Law > Congressional Duties & Powers > Contracts Clause
[HN2] See U.S. Const. art. I, § 10.

Constitutional Law > Congressional Duties & Powers > Contracts Clause
Governments > State & Territorial Governments > Police Power
[HN3] Literalism in the construction of the Contract Clause would make it destructive of the public interest by depriving the State of its prerogative of self-protection.

Constitutional Law > Congressional Duties & Powers > Contracts Clause
Governments > State & Territorial Governments > Police Power
[HN4] The Contract Clause does not operate to obliterate the police power of the states.

Constitutional Law > Congressional Duties & Powers > Contracts Clause
[HN5] One whose rights are subject to state restriction cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.

Constitutional Law > Congressional Duties & Powers > Contracts Clause
Governments > State & Territorial Governments > Police Power
[HN6] Despite the Contract Clause, the states retain residual authority to enact laws to safeguard the vital interests of their people. In upholding a state law, the following factors are significant; (1) that the state legislature has declared in the Act itself that an emergency need for the protection existed; (2) that the state law was enacted to protect a basic societal interest, not a favored group; (3) that the relief was appropriately tailored to the emergency that it was designed to meet; (4) that the imposed conditions were reasonable; (5) that the legislation was limited to the duration of the emergency. Another consideration in upholding a state law against a Contract Clause attack: is whether the petitioner had purchased into an enterprise already regulated in the particular to which he now objects.

Constitutional Law > Congressional Duties & Powers > Contracts Clause
Governments > State & Territorial Governments > Police Power
[HN7] Although the absolute language of the Contract Clause leaves room for the "essential attributes of sovereign power," necessarily reserved by the states to safeguard the welfare of their citizens, that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption.

Constitutional Law > Congressional Duties & Powers > Contracts Clause
[HN8] The first inquiry in determining whether a state law violates the Contract Clause, must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Constitutional Law > Congressional Duties & Powers > Contracts Clause
[HN9] The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

SUMMARY:

A company with an office in Minnesota had a pension plan, under which employees could receive a pension upon retirement at age 65 regardless of length of service. Furthermore, an employee's right to a pension vested prior to age 65 if certain requirements as to length of service and age were met. The company was the sole contributor to the pension fund, but the plan neither required the company to make specific contributions nor imposed any sanction for failing to contribute adequately. The company retained a virtually unrestricted right to amend the plan, and was free to terminate it and distribute the assets at any time according to a predetermined method. Minnesota enacted a statute, under which private employers of 100 or more employees providing pension benefits under qualified plans were subject to a "pension funding charge" upon termination of the plan or closing of an office within the state. The charge was assessed if pension funds were not sufficient to cover full pensions for all employees working at least 10 years. After enactment of the statute, in a move planned before its passage, the company closed its Minnesota office. Several discharged employees, who had no vested pension rights under the plan, were nonetheless pension obligees under the statute. The state notified the company that it owed a significant pension funding charge, and the company brought suit in the United States District Court for the District of Minnesota for injunctive and declaratory relief, claiming that the act unconstitutionally impaired its contractual obligation to its employees under

its pension agreement. A three-judge District Court upheld the statute as applied to the company *(449 F Supp 644)*.

On direct appeal, the United States Supreme Court reversed. In an opinion by Stewart, J., joined by Burger, Ch. J., and Powell, Rehnquist, and Stevens, JJ., it was held that the Minnesota statute, as applied to the company, violated the contract clause of the Federal Constitution (Art I, 10, cl 1), it not being necessary to hold that the state law impaired the obligation of the company's employment contracts without moderation or reason or in a spirit of oppression, since (1) the law was not enacted to deal with a broad, generalized, economic or social problem, (2) it did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the state, (3) it did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships, irrevocably and retroactively, and (4) its narrow aim was leveled not at every Minnesota employer, and not even at every Minnesota employer who left the state, but only at those who had in the past been sufficiently enlightened to voluntarily agree to establish pension plans for their employees.

Brennan, J., joined by White and Marshall, JJ., dissented, expressing the view that (1) the statute, which simply created an additional duty for the company but which did not abrogate or dilute any obligation due a party to a private contract, did not implicate the contract clause in any way, the clause not protecting all contract-based expectations including that of an employer that his obligations to his employees not be legislatively enlarged beyond those explicitly provided in its pension plan, and (2) the statute did not violate the due process clause of the Fourteenth Amendment.

Blackmun, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]
LAW § 271
contract clause -- state statute -- pensions --
Headnote:[1A][1B]

A state statute which subjects certain private employers who provide pension benefits under a covered plan to a "pension funding charge" if the employer terminates the plan or closes an office within the state, such charge being assessed if the pension fund is insufficient to cover full pensions for all employees working at least 10 years, violates the contract clause of the Federal Constitution (Art I, 10, cl 1) insofar as it applies to an employer, some of whose employees, having been discharged upon the closing of its office, had no vested rights under its pension plan (which predated the statute) but nonetheless qualified as pension obligees under the statute, it not being necessary to hold that the state statute impairs the obligation of the company's employment contracts without moderation or reason or in a spirit of oppression, where (1) the statute was not enacted to deal with a broad, generalized economic or social problem, (2) the statute does not operate in an area already subject to state regulation at the time the company's contractual obligations under the pension plan were originally undertaken, but instead invades an area never before subject to regulation by the state, (3) the statute does not effect simply a temporary alteration of the contractual relationships of those within its coverage, but works a severe, permanent, and immediate change in those relationships, irrevocably and retroactively, and (4) the statute's narrow aim is leveled not at every employer within the state, or not even at every employer leaving the state, but only at those employers who in the past were sufficiently enlightened to voluntarily agree to establish pension plans for their employees. (Brennan, White, and Marshall, JJ., dissented from this holding.)

[***LEdHN2]
LAW § 214(1)
contract clause -- state police power --
Headnote:[2]

The contract clause of the Federal Constitution (Art I, 10, cl 1) does not operate to obliterate the police power of the state; the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected, and this police power, which is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, is paramount to any rights under contracts between individuals.

[***LEdHN3]
LAW § 142
contract -- subject matter infirmity --
Headnote:[3]

One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them, since the contract will carry with it the infirmity of the subject matter.

[***LEdHN4]
LAW § 124

contract clause -- limitations on state power -- police power --
Headnote:[4]

The contract clause of the Federal Constitution (Art I, 10, cl 1) imposes limits upon the power of the state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.

[***LEdHN5]
LAW § 128
contract clause -- state legislation --
Headnote:[5]

For purposes of the contract clause of the Federal Constitution (Art I, 10, cl 1), despite the customary deference courts give to state laws directed to social and economic problems, legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption.

[***LEdHN6]
CONTRACTS § 145
bilateral contract -- diminution of duties --
Headnote:[6A][6B]

In any bilateral contract the diminution of duties on one side effectively increases the duties on the other.

SYLLABUS:

Appellant, an Illinois corporation, maintained an office in Minnesota with 30 employees. Under appellant's pension plan, adopted in 1963 and qualified under *§ 401 of the Internal Revenue Code*, employees were entitled to retire and receive a pension at age 65 regardless of length of service, and an employee's pension right became vested if he satisfied certain conditions as to length of service and age. Appellant was the sole contributor to the pension trust fund, and each year made contributions to the fund based on actuarial predictions of eventual payout needs. But the plan neither required appellant to make specific contributions nor imposed any sanction on it for failing to make adequate contributions, and appellant retained a right not only to amend the plan but also to terminate it at any time and for any reason. In 1974, Minnesota enacted the Private Pension Benefits Protection Act (Act), under which a private employer of 100 employees or more (at least one of whom was a Minnesota resident) who provided pension benefits under a plan meeting the qualifications of *§ 401 of the Internal Revenue Code*, was subject to a "pension funding charge" if he terminated the plan or closed a Minnesota office. The charge was assessed if the pension funds were insufficient to cover full pensions for all employees who had worked at least 10 years, and periods of employment prior to the effective date of the Act were to be included in the 10-year employment criterion. Shortly thereafter, in a move planned before passage of the Act, appellant closed its Minnesota office, and several of its employees, who were then discharged, had no vested pension rights under appellant's plan but had worked for appellant for 10 years or more, thus qualifying as pension obligees under the Act. Subsequently, the State notified appellant that it owed a pension funding charge of $ 185,000 under the Act. Appellant then brought suit in Federal District Court for injunctive and declaratory relief, claiming that the Act unconstitutionally impaired its contractual obligations to its employees under its pension plan, but the court upheld the Act as applied to appellant. *Held*: The application of the Act to appellant violates the Contract Clause of the Constitution, which provides that "[no] State shall . . . pass any . . . Law impairing the Obligation of Contracts." Pp. 240-251.

(a) While the Contract Clause does not operate to obliterate the police power of the States, it does impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co.* v. *New Jersey, 431 U.S. 1, 22.* Pp. 242-244.

(b) The impact of the Act upon appellant's contractual obligations was both substantial and severe. Not only did the Act retroactively modify the compensation that appellant had agreed to pay its employees from 1963 to 1974, but it did so by changing appellant's obligations in an area where the element of reliance was vital -- the funding of a pension plan. Moreover, the retroactive state-imposed vesting requirement was applied only to those employers who terminated their pension plans or who, like appellant, closed their Minnesota offices, thus forcing the employer to make all the retroactive changes in its contractual obligations at one time. Pp. 244-247.

(c) The Act does not possess the attributes of those state laws that have survived challenge under the Contract Clause. It was not even purportedly enacted to deal with a broad, generalized economic or social problem, cf. *Home Building & Loan Assn.* v. *Blaisdell, 290 U.S. 398, 445,* but has an extremely narrow focus and enters an area never before subject to regulation by the State. Pp. 247-250.

COUNSEL:

George B. Christensen argued the cause for appellant. With him on the briefs were Chester W. Nosal and John R. Kenefick.

Byron E. Starns, Chief Deputy Attorney General of Minnesota, argued the cause for appellees. With him on the brief were Warren Spannaus, Attorney General, pro se, Richard B. Allyn, Solicitor General, and Kent G. Harbison, Richard A. Lockridge, and Jon K. Murphy, Special Assistant Attorneys General. *

* Peter G. Nash, Eugene B. Granof, and Stanley T. Kaleczyc filed a brief for the Chamber of Commerce of the United States as amicus curiae urging reversal.

JUDGES:

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, post, p. 251. BLACKMUN, J., took no part in the consideration or decision of the case.

OPINIONBY:

STEWART

OPINION:

[*236] [***731] [**2718] MR. JUSTICE STEWART delivered the opinion of the Court.

[***LEdHR1A] [1A]The issue in this case is whether the application of Minnesota's Private Pension Benefits Protection Act n1 to the appellant violates the Contract Clause of the United States Constitution.

n1 *Minn. Stat. § 181B.01 et seq.* (1974). This is the same Act that was considered in *Malone v. White Motor Corp., 435 U.S. 497,* a case presenting a quite different legal issue.

I

In 1974 appellant Allied Structural Steel Co. (company), a corporation with its principal place of business in Illinois, maintained an office in Minnesota with 30 employees. Under the company's general pension plan, adopted in 1963 and qualified as a single-employer plan under *§ 401 of the Internal Revenue Code, 26 U. S. C. § 401* (1976 ed.), n2 salaried employees were covered as follows: At age 65 an employee was entitled to retire and receive a monthly pension generally computed by multiplying 1% of his average monthly earnings by the total number of his years of employment with the company. n3 Thus, an employee aged 65 or more could retire without satisfying any particular length-of-service requirement, but the size of his pension would reflect the length of his service with the company. n4 An employee could also [*237] become entitled to receive a pension, payable in full at age 65, if he met any one of the following requirements: (1) he had worked 15 years for the company and reached the age of 60; or (2) he was at least 55 years old and the sum of his age and his years of service with the company was at least 75; or (3) he was less than 55 years old but the sum of his age and his years of service with the company was at least 80. Once an employee satisfied any one of these conditions, his pension right became vested in the sense that any subsequent termination of employment would not affect his right to receive a monthly pension when he reached 65. [**2719] Those employees who quit or were discharged before age 65 without fulfilling one of the other three conditions did not acquire any pension rights.

n2 The plan was not the result of a collective-bargaining agreement, and no such agreement is at issue in this case.

n3 The employee could elect to receive instead a lump-sum payment.

n4 Thus, an employee whose average monthly earnings were $ 800 and who retired at 65 would receive eight dollars monthly if he had worked one year for the company and $ 320 monthly if he had worked for the company for 40 years.

The company was the sole contributor to the pension trust fund, and each year it made contributions to the fund based on actuarial predictions of eventual payout needs. Although those contributions once made were irrevocable, in the sense that they remained part of the pension trust fund, the plan neither required the company to make specific [***732] contributions nor imposed any sanction on it for failing to contribute adequately to the fund.

The company not only retained a virtually unrestricted right to amend the plan in whole or in part, but was also free to terminate the plan and distribute the trust assets at any time and for any reason. In the event of a termination, the assets of the fund were to go, first, to meet the plan's obligation to those employees already retired and receiving pensions; second, to those eligible for retirement; and finally, if any balance remained, to the other employees covered under the plan whose pension rights had not yet vested. n5 Employees within each

of these categories were assured payment only to the extent of the pension assets.

n5 Apart from termination of the fund and distribution of the trust assets, there was no other situation in which employees in this third category would receive anything from the pension fund.

[*238] The plan expressly stated:

"No employee shall have any right to, or interest in, any part of the Trust's assets upon termination of his employment or otherwise, except as provided from time to time under this Plan, and then only to the extent of the benefits payable to such employee out of the assets of the Trust. All payments of benefits as provided for in this Plan shall be made solely out of the assets of the Trust and neither the employer, the trustee, nor any member of the Committee shall be liable therefor in any manner."

The plan also specifically advised employees that neither its existence nor any of its terms were to be understood as implying any assurance that employees could not be dismissed from their employment with the company at any time.

In sum, an employee who did not die, did not quit, and was not discharged before meeting one of the requirements of the plan would receive a fixed pension at age 65 if the company remained in business and elected to continue the pension plan in essentially its existing form.

On April 9, 1974, Minnesota enacted the law here in question, the Private Pension Benefits Protection Act, Minn. Stat. § § 181B.01-181B.17. Under the Act, a private employer of 100 employees or more -- at least one of whom was a Minnesota resident -- who provided pension benefits under a plan meeting the qualifications of *§ 401 of the Internal Revenue Code*, was subject to a "pension funding charge" if he either terminated the plan or closed a Minnesota office. n6 The charge was assessed if the pension funds were not sufficient to cover full pensions for all employees who had worked at least 10 years. The Act required the employer to satisfy the deficiency by purchasing deferred annuities, payable to the employees at their normal retirement age. A separate provision [*239] specified that periods of employment prior to the effective date of the Act were to be included in the 10-year employment criterion. n7

n6 Although the company had only 30 employees in Minnesota, it was subject to the Act because it had over 100 employees altogether.

n7 Entitled "Nonvested Benefits Prior to Act," [HN1] *Minn. Stat. § 181B.04* provided:

"Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17."

[***733] [**2720] During the summer of 1974 the company began closing its Minnesota office. On July 31, it discharged 11 of its 30 Minnesota employees, and the following month it notified the Minnesota Commissioner of Labor and Industry, as required by the Act, that it was terminating an office in the State. n8 At least nine of the discharged employees did not have any vested pension rights under the company's plan, but had worked for the company for 10 years or more and thus qualified as pension obligees of the company under the law that Minnesota had enacted a few months earlier. On August 18, the State notified the company that it owed a pension funding charge of approximately $ 185,000 under the provisions of the Private Pension Benefits Protection Act.

n8 According to the stipulated facts, the closing of the company's Minnesota office resulted from a shift of that office's duties to the main company office in Illinois the previous December. The closing was not completed until February 1975, by which time the Minnesota Act had been pre-empted by federal law. See *Malone v. White Motor Corp., 435 U.S., at 499.* We deal here solely with the application of the Minnesota Act to the 11 employees discharged in July 1974.

The company brought suit in a Federal District Court asking [*240] for injunctive and declaratory re-

lief. It claimed that the Act unconstitutionally impaired its contractual obligations to its employees under its pension agreement. The three-judge court upheld the constitutional validity of the Act as applied to the company, *Fleck v. Spannaus, 449 F.Supp. 644,* and an appeal was brought to this Court under *28 U. S. C. § 1253* (1976 ed.). n9 We noted probable jurisdiction. *434 U.S. 1045.*

n9 The claims of Walter Fleck and the other two individual plaintiffs were dismissed by the District Court for lack of standing, *Fleck v. Spannaus, 421 F.Supp. 20,* leaving only the company as an appellant. Warren Spannaus, the Attorney General of Minnesota, is an appellee.

II

A

There can be no question of the impact of the Minnesota Private Pension Benefits Protection Act upon the company's contractual relationships with its employees. The Act substantially altered those relationships by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake. But it does not inexorably follow that the Act, as applied to the company, violates the Contract Clause of the Constitution.

The language of the Contract Clause appears unambiguously absolute: [HN2] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10. The Clause is not, however, the Draconian provision that its words might seem to imply. As the Court [***734] has recognized, [HN3] "literalism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection." *W. B. Worthen Co.* v. *Thomas, 292 U.S. 426, 433.* n10

n10 See generally B. Schwartz, A Commentary on the Constitution of the United States, Pt. 2, The Rights of Property 266-306 (1965); B. Wright, The Contract Clause of the Constitution (1938).

[*241] Although it was perhaps the strongest single constitutional check on state legislation during our early years as a Nation, n11 the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern constitutional history. n12 Nonetheless, the Contract [**2721] Clause remains part of the Constitution. It is not a dead letter. And its basic contours are brought into focus by several of this Court's 20th-century decisions.

n11 Perhaps the best known of all Contract Clause cases of that era was *Dartmouth College v. Woodward, 4 Wheat. 518.*

n12 Indeed, at least one commentator has suggested that "the results might be the same if the contract clause were dropped out of the Constitution, and the challenged statutes all judged as reasonable or unreasonable deprivations of property." Hale, The Supreme Court and the Contract Clause: III, *57 Harv. L. Rev. 852, 890-891 (1944).*

[***LEdHR2] [2] [***LEdHR3] [3]First of all, it is to be accepted as a commonplace that [HN4] the Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Manigault v. Springs, 199 U.S. 473, 480.* As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in *Hudson Water Co.* v. *McCarter, 209 U.S. 349, 357:* [HN5] "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract [*242] about them. The contract will carry with it the infirmity of the subject matter."

B

[***LEdHR4] [4]If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. The existence and nature of those limits were clearly indicated in a series of cases in this Court arising from the efforts of the States to deal with the unprecedented emergencies brought on by the severe economic depression of the early 1930's.

In *Home Building & Loan Assn.* v. *Blaisdell, 290 U.S. 398,* the Court [***735] upheld against a Contract Clause attack a mortgage moratorium law that Minnesota had enacted to provide relief for homeowners threatened with foreclosure. Although the legislation conflicted directly with lenders' contractual foreclosure rights, the Court there acknowledged that, [HN6] despite the Contract Clause, the States retain residual authority to enact laws "to safeguard the vital interests of [their] people." *Id., at 434.* In upholding the state mortgage moratorium law, the Court found five factors significant. First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. *Id., at 444.* Second, the state law was enacted to protect a basic societal interest, not a favored group. *Id., at 445.* Third, the relief was appropriately tailored to the emergency that it was designed to meet. *Ibid.* Fourth, the imposed conditions were reasonable. *Id., at 445-447.* And, finally, the legislation was limited to the duration of the emergency. *Id., at 447.*

The *Blaisdell* opinion thus clearly implied that if the Minnesota moratorium legislation had not possessed the characteristics attributed to it by the Court, it would have been invalid under the Contract Clause of the Constitution. n13 [*243] These implications were given concrete force in three cases that followed closely in *Blaisdell*'s wake.

n13 In *Veix v. Sixth Ward Building & Loan Assn., 310 U.S. 32, 38,* the Court took into account still another consideration in upholding a state law against a Contract Clause attack: the petitioner had "purchased into an enterprise already regulated in the particular to which he now objects."

In *W. B. Worthen Co.* v. *Thomas, 292 U.S. 426,* the Court dealt with an Arkansas law that exempted the proceeds of a life insurance policy from collection by the beneficiary's judgment creditors. Stressing the retroactive effect of the state law, the Court held that it was invalid under the Contract Clause, since it [**2722] was not precisely and reasonably designed to meet a grave temporary emergency in the interest of the general welfare. In *W. B. Worthen Co.* v. *Kavanaugh, 295 U.S. 56,* the Court was confronted with another Arkansas law that diluted the rights and remedies of mortgage bondholders. The Court held the law invalid under the Contract Clause. "Even when the public welfare is invoked as an excuse," Mr. Justice Cardozo wrote for the Court, the security of a mortgage cannot be cut down "without moderation or reason or in a spirit of oppression." *Id., at 60.* And finally, in *Treigle v. Acme Homestead Assn., 297 U.S. 189,* the Court held invalid under the Contract Clause a Louisiana law that modified the existing withdrawal rights of the members of a building and loan association. "Such an interference with the right of contract," said the Court, "cannot be justified by saying that in the public interest the operations of building associations may be controlled [***736] and regulated, or that in the same interest their charters may be amended." *Id., at 196.*

[***LEdHR5] [5]The most recent Contract Clause case in this Court was *United States Trust Co.* v. *New Jersey, 431 U.S. 1.* n14 In [*244] that case the Court again recognized that [HN7] although the absolute language of the Clause must leave room for "the 'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens," *id., at 21,* that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, "[legislation] adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Id., at 22.* Evaluating with particular scrutiny a modification of a contract to which the State itself was a party, the Court in that case held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause because the legislation was neither necessary nor reasonable. n15

n14 See also *El Paso v. Simmons, 379 U.S. 497.* There the Court held that a Texas law shortening the time within which a defaulted land claim could be reinstated did not violate the Contract Clause. "We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible right to reinstatement . . . or that he interpreted that right to be of everlasting effect. At the time the contract was entered into the State's policy was to sell the land as quickly as possible . . . ." *Id., at 514.* In sum, "[the] measure taken . . . was a mild one indeed, hardly burdensome to the purchaser . . . but nonetheless an important one to the State's interest." *Id., at 516-517.*

n15 The Court indicated that impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties, *431 U.S., at 22-23,* although it was careful to add that "private con-

tracts are not subject to unlimited modification under the police power." *Id., at 22.*

III

[***LEdHR6A] [6A]In applying these principles to the present case, [HN8] the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. n16 [*245] The severity of the impairment [***737] [**2723] measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. n17 Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

n16

[***LEdHR6B] [6B]The novel construction of the Contract Clause expressed in the dissenting opinion is wholly contrary to the decisions of this Court. The narrow view that the Clause forbids only state laws that diminish the duties of a contractual obligor and not laws that increase them, a view arguably suggested by *Satterlee v. Matthewson, 2 Pet. 380,* has since been expressly repudiated. *Detroit United R. Co.* v. *Michigan, 242 U.S. 238; Georgia R. & Power Co.* v. *Decatur, 262 U.S. 432.* See also, *e. g., Sherman v. Smith, 1 Black 587; Bernheimer v. Converse, 206 U.S. 516, 530; Henley v. Myers, 215 U.S. 373; National Surety Co.* v. *Architectural Decorating Co., 226 U.S. 276; Columbia R., Gas & Electric Co.* v. *South Carolina, 261 U.S. 236; Stockholders of Peoples Banking Co.* v. *Sterling, 300 U.S. 175.* Moreover, in any bilateral contract the diminution of duties on one side effectively increases the duties on the other.

The even narrower view that the Clause is limited in its application to state laws relieving debtors of obligations to their creditors is, as the dissent recognizes, *post,* at 257 n. 5, completely at odds with this Court's decisions. See *Dartmouth College v. Woodward, 4 Wheat. 518; Wood v. Lovett, 313 U.S. 362; El Paso v. Simmons, supra.* See generally Hale, The Supreme Court and the Contract Clause, *57 Harv. L. Rev. 512, 514-516 (1944).*

n17 See n. 14, *supra.*

[HN9] The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Here, the company's contracts of employment with its employees included as a fringe benefit or additional form of compensation, the pension plan. The company's maximum obligation was to set aside each year an amount based on the plan's requirements for vesting. The plan satisfied the current federal income tax code and was subject to no other legislative requirements. And, of course, the company was free to amend or terminate the pension plan at any time. The company thus had no reason to anticipate that its employees' [*246] pension rights could become vested except in accordance with the terms of the plan. It relied heavily, and reasonably, on this legitimate contractual expectation in calculating its annual contributions to the pension fund.

The effect of Minnesota's Private Pension Benefits Protection Act on this contractual obligation was severe. The company was required in 1974 to have made its contributions throughout the pre-1974 life of its plan as if employees' pension rights had vested after 10 years, instead of vesting in accord with the terms of the plan. Thus a basic term of the pension contract -- one on which the company had relied for 10 years -- was substantially modified. The result was that, although the company's past contributions were adequate when made, they were not adequate when computed under the 10-year statutory vesting requirement. The Act thus forced a current recalculation of the past 10 years' contributions based on the new, unanticipated 10-year vesting requirement.

Not only did the state law thus retroactively modify the compensation that the company had agreed to pay its employees from 1963 to 1974, but also it did so by changing the company's obligations in an area where the element of reliance was vital -- the funding of a pension plan. n18 As the Court has recently recognized:

[***738] "These [pension] plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the [*247] calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the

insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, [**2724] can have this effect." *Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 721.*

n18 In some situations the element of reliance may cut both ways. Here, the company had relied upon the funding obligation of the pension plan for more than a decade. There was no showing of reliance to the contrary by its employees. Indeed, Minnesota did not act to protect any employee reliance interest demonstrated on the record. Instead, it compelled the employer to exceed bargained-for expectations and nullified an express term of the pension plan.

Moreover, the retroactive state-imposed vesting requirement was applied only to those employers who terminated their pension plans or who, like the company, closed their Minnesota offices. The company was thus forced to make all the retroactive changes in its contractual obligations at one time. By simply proceeding to close its office in Minnesota, a move that had been planned before the passage of the Act, the company was assessed an immediate pension funding charge of approximately $ 185,000.

Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. There is not even any provision for gradual applicability or grace periods. Cf. the Employee Retirement Income Security Act of 1974 (ERISA), *29 U. S. C. § § 1061* (b)(2), 1086 (b), and 1144 (1976 ed.). See n. 23, *infra.* Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem. The presumption favoring "legislative judgment as to the necessity and reasonableness of a particular measure," *United States Trust Co., 431 U.S., at 23,* simply cannot stand in this case.

The only indication of legislative intent in the record before us is to be found in a statement in the District Court's opinion:

"It seems clear that the problem of plant closure and pension plan termination was brought to the attention [*248] of the Minnesota legislature when the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota plants and attempted to terminate its pension plan." *449 F.Supp., at 651.* n19

n19 The Minnesota Supreme Court, *Fleck v. Spannaus, 312 Minn. 223, 251 N. W. 2d 334,* engaged in mere speculation as to the state legislature's purpose.

But whether or not the legislation was aimed largely at a single employer, n20 it clearly has an extremely [***739] narrow focus. It applies only to private employers who have at least 100 employees, at least one of whom works in Minnesota, and who have established voluntary private pension plans, qualified under *§ 401 of the Internal Revenue Code.* And it applies only when such an employer closes his Minnesota office or terminates his pension plan. n21 Thus, this law can [*249] hardly be characterized, like the law at issue in the *Blaisdell* case, as one enacted to protect a broad societal interest rather than a narrow class. n22

n20 In *Malone v. White Motor Corp., 435 U.S., at 501 n. 5,* the Court noted that the White Motor Corp., an employer of more than 1,000 Minnesota employees, had been prohibited from terminating its pension plan until the expiration date of its collective-bargaining agreement, May 1, 1974. *International Union, UAW v. White Motor Corp., 505 F.2d 1193* (CA8). On April 9, 1974, the Minnesota Act was passed, to become effective the following day. When White Motor proceeded to terminate its collectively bargained pension plan at the earliest possible date, May 1, 1974, the State assessed a deficiency of more than $ 19 million, based upon the Act's 10-year vesting requirement.

n21 Not only did the Act have an extremely narrow aim, but also its effective life was extremely short. The United States House of Representatives had passed a version of the Employee Retirement Income Security Act of 1974, *29 U. S. C. § 1001 et seq.* (1976 ed.), on February 28, 1974, 120 Cong. Rec. 4781-4782 (1974), and the Senate on March 4, 1974, *id.*, at 5011. Both versions expressly pre-empted state laws. That the Minnesota Legislature was aware of the impending federal legislation is reflected in the explicit provision of the Act that it will "become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States." *Minn. Stat. § 181B.17.* ERISA itself, effective January 1, 1975, expressly preempts all state laws regulating covered plans. *29 U. S. C. § 1144* (a) (1976 ed.). Thus, the Minne-

sota Act was in force less than nine months, from April 10, 1974, until January 1, 1975. The company argues that the enactment of the law while ERISA was on the horizon totally belies the State's need for this pension legislation.

n22 In upholding the constitutionality of the Act, the District Court referred to Minnesota's interest in protecting the economic welfare of its older citizens, as well as their surrounding economic communities. *449 F.Supp. 644.*

[**2725] Moreover, in at least one other important respect the Act does not resemble the mortgage moratorium legislation whose constitutionality was upheld in the *Blaisdell* case. This legislation, imposing a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees, n23 was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's -- conditions of which the Court in *Blaisdell* took judicial notice. n24

n23 Compare the gradual applicability of ERISA, which itself is not even mandatory. At the outset ERISA did not go into effect at all until four months after it was enacted. *29 U. S. C. § 1144* (1976 ed.). Funding and vesting requirements were delayed for an additional year. § § 1086 (b), 1061 (b)(2) (1976 ed.). By contrast, the Minnesota Act became fully effective the day after its passage. The District Court rejected out of hand the argument that employers were constitutionally entitled to some grace period to adjust their pension planning. *449 F.Supp., at 651.*

n24 This is not to suggest that only an emergency of great magnitude can constitutionally justify a state law impairing the obligations of contracts. See, *e. g., Veix v. Sixth Ward Building & Loan Assn., 310 U.S., at 39-40; East New York Savings Bank v. Hahn, 326 U.S. 230; El Paso v. Simmons, 379 U.S. 497.*

Entering a field it had never before sought to regulate, the Minnesota Legislature grossly distorted the company's existing contractual relationships with its employees by superimposing retroactive obligations upon the company substantially [*250] beyond the terms of its employment contracts. And that burden was imposed upon the company only because it closed its office in the State.

[***740]

[***LEdHR1B] [1B]This Minnesota law simply does not possess the attributes of those state laws that in the past have survived challenge under the Contract Clause of the Constitution. The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. Cf. *Home Building & Loan Assn.* v. *Blaisdell, 290 U.S., at 445.* It did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State. Cf. *Veix v. Sixth Ward Building & Loan Assn., 310 U.S. 32, 38.* n25 It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships -- irrevocably and retroactively. Cf. *United States Trust Co.* v. *New Jersey, 431 U.S., at 22.* And its narrow aim was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees.

n25 See n. 13, *supra.*

"Not Blaisdell's case, but Worthen's (*W. B. Worthen Co.* v. *Thomas, [292 U.S. 426])* supplies the applicable rule" here. *W. B. Worthen Co.* v. *Kavanaugh, 295 U.S., at 63.* It is not necessary to hold that the Minnesota law impaired the obligation of the company's employment contracts "without moderation or reason or in a spirit of oppression." *Id., at 60.* n26 But we do hold that if the Contract Clause means anything at [*251] all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case.

n26 As Mr. Justice Cardozo's opinion for the Court in the *Kavanaugh* case made clear, these criteria are "the outermost limits only." The opinion went on to stress the state law's "studied indifference to the interests" of creditors. *295 U.S., at 60.*

The judgment of the District Court is reversed.

It is so ordered.

[**2726] MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

DISSENTBY:

BRENNAN

DISSENT:

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

In cases involving state legislation affecting private contracts, this Court's decisions over the past half century, consistently with both the constitutional text and its original understanding, have interpreted the Contract Clause as prohibiting state legislative Acts which, "[with] studied indifference to the interests of the [contracting party] or to his appropriate protection," effectively diminished or nullified the obligation due him under the terms of a contract. *W. B. Worthen Co.* v. *Kavanaugh, 295 U.S. 56, 60* [***741] *(1935).* But the Contract Clause has not, during this period, been applied to state legislation that, while creating new duties, in no-wise diminished the efficacy of any contractual obligation owed the constitutional claimant. Cf. *Goldblatt v. Hempstead, 369 U.S. 590 (1962).* The constitutionality of such legislation has, rather, been determined solely by reference to other provisions of the Constitution, *e. g.*, the Due Process Clause, insofar as they operate to protect existing economic values.

Today's decision greatly expands the reach of the Clause. The Minnesota Private Pension Benefits Protection Act (Act) does not abrogate or dilute any obligation due a party to a private contract; rather, like all positive social legislation, the Act imposes new, additional obligations on a particular class of persons. In my view, any constitutional infirmity in the law must therefore derive, not from the Contract Clause, but from the Due Process Clause of the Fourteenth Amendment. [*252] I perceive nothing in the Act that works a denial of due process and therefore I dissent.

I

I begin with an assessment of the operation and effect of the Minnesota statute. Although the Court disclaims knowledge of the purposes of the law, both the terms of the Act and the opinion of the State Supreme Court disclose that it was designed to remedy a serious social problem arising from the operation of private pension plans. As the Minnesota Supreme Court indicated, see *Fleck v. Spannaus, 312 Minn. 223, 231, 251 N. W. 2d 334, 338 (1977),* the impetus for the law must have been a legislative belief -- shared by Congress, see generally Employee Retirement Income Security Act of 1974 (ERISA), *29 U. S. C. § 1001 et seq.* (1976 ed.) -- that private pension plans often were grossly unfair to covered employees. Not only would employers often neglect to furnish their employees with adequate information concerning their rights under the plans, leading to erroneous expectations, but also because employers often failed to make contributions to the pension funds large enough adequately to fund their plans, employees often ultimately received only a small amount of those benefits they reasonably anticipated. See *Fleck v. Spannaus, supra, at 231, 251 N. W. 2d, at 338.* Acting against this background, Minnesota, prior to the enactment of ERISA, adopted the Act to remedy, *inter alia*, what was viewed as a related serious social problem: the frustration of expectation interests that can occur when an employer closes a single plant and terminates the employees who work there. n1

n1 Since appellant's plan remains in force at its other plants, this case does not involve a termination of a pension plan, and I will therefore not discuss the aspect of the statute that involves such contingencies except to observe that it, too, is a sensitive attempt to protect employees' expectation interests.

Pension plans normally do not make provision to protect [*253] the interests of employees -- even those within only a few months of the "vesting" of their rights under the plan -- who are terminated because an employer closes one of his plants. See generally Bernstein, Employee Pension Rights When Plants Shut Down: Problems and Some Proposals, *76* [***742] *Harv. L. Rev. 952 (1963).* Even assuming -- contrary to common experience -- [**2727] that an employer adequately informs his employees that a termination for any reason prior to vesting will result in forfeiture of accrued pension credits, denial of all pension benefits not because of job-related failings, but only because the employees are unfortunate enough to be employed at a plant that closes for purely economic reasons, is harsh indeed. For unlike discharges for inadequate job performance, which may reasonably be foreseen, the closing of a plant is a contingency outside the range of normal expectations of both the employer and the employee -- as is made clear by the fact that Allied did not rely upon the possibility of a plant's closing in calculating the amount of its contributions to its pension plan fund. n2

n2 All parties to this case agree that Allied's actuarial assumptions in calculating its annual contributions to the pension plan did not include the possibility of a plant's closing.

The Minnesota Act addresses this problem by selecting a period -- 10 years of employment -- after which this generally unforeseen contingency may not be the basis for depriving employees of their accumulated pension fund credits, and by establishing a mechanism to provide the employees with the equivalent of the earned pension plan credits. Although the Court glides over this fact, it should be apparent that the Act will impose only minor economic burdens on employers whose pension plans have been adequately funded. For, where, as was true here and as will generally be true, the possibility of a plant's closing was not relied upon by actuaries in calculating the amount of the employer's contributions to the plan, an [*254] adequate pension plan fund would include contributions on behalf of terminated employees of 10 or more years' service whose rights had not vested. Indeed, without the Act, the closing of the plant would create a windfall for the employer, because, due to the resulting surplus in the fund, his future contributions would be reduced. In denying the windfall, the Act requires that the employer use the money he will save in the future to purchase annuities for the terminated employees. n3 Of course, the consequence for the employer may be a slightly higher pension expense; the greater outlay might arise, in part, because the past contributions to the plan would have reflected the actuarial possibility that some of the employees who had served 10 years might not ultimately satisfy the plan's vesting requirement.

n3 Because appellant's pension plan was, at the time of the plant closing, underfunded by in excess of $ 295,000, appellant's pension-funding charge -- which the parties stipulate will be between $ 114,000 and $ 195,000 -- will not in fact be offset by future out-of-pocket savings. But this is incidental. What is critical is that appellant, like all covered employers, will be forced to assume an economic burden only a little greater than that inherent in its original undertaking to set up a pension plan for the benefit of its employees.

Although the Court refers to the fact that, under the terms of the plan, no sanctions could be imposed on appellant for not adequately funding it, no substantial objection can be levied against the Act to the extent that it mandates funding sufficient to meet the employer's original undertaking. The plan in the present case can be interpreted as imposing a duty on the employer to fund it adequately, see App. to Brief for Appellant 10a (§ 10 of the plan), and the employees here surely would have understood it as imposing that requirement. There can be no serious objection to a measure that makes such a promise enforceable.

I emphasize, contrary to the repeated [***743] protestations of the Court, that the Act does not impose "sudden and unanticipated" burdens. The features of the Act involved in this case come into play only when an employer, after the effective date of the Act, closes a plant. The existence of the Act's duties -- which are similar to a legislatively imposed requirement of [*255] severance pay measured by the length of the discharged employees' service -- is simply one of a number of factors that the employer considers in making the business decision whether to close a plant and terminate the employees who work there. In no sense, therefore, are the Act's requirements unanticipated. While the extent of the employer's obligation depends on pre-enactment [**2728] conduct, the requirements are triggered solely by the closing of a plant subsequent to enactment. n4

n4 Although appellant here apparently decided to close its Minnesota plant prior to the Act's effective date, appellant had every opportunity to reconsider that decision after the Act was adopted and presumably reached its final decision after weighing the possible liabilities under the Act.

II

The primary question in this case is whether the Contract Clause is violated by state legislation enacted to protect employees covered by a pension plan by requiring an employer to make outlays -- which, although not in this case, will largely be offset against future savings -- to provide terminated employees with the equivalent of benefits reasonably to be expected under the plan. The Act does not relieve either the employer or his employees of any existing contract obligation. Rather, the Act simply creates an additional, supplemental duty of the employer, no different in kind from myriad duties created by a wide variety of legislative measures which defeat settled expectations but which have nonetheless been sustained by this Court. See, *e. g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); Hadacheck v. Sebastian, 239 U.S. 394 (1915).* For this reason, the Minnesota Act, in my view, does not implicate the Contract Clause in any way. The basic fallacy of today's decision is its mistaken view that the Contract Clause protects all contract-based expectations, including that of an employer that his obligations to his employees will not be legislatively enlarged beyond those explicitly provided in his pension plan.

[*256] A

Historically, it is crystal clear that the Contract Clause was not intended to embody a broad constitutional policy of protecting all reliance interests grounded in private contracts. It was made part of the Constitution to remedy a particular social evil -- the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts -- and thus was intended to prohibit States from adopting "as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them," *Home Building & Loan Assn.* v. *Blaisdell, 290 U.S. 398, 439 (1934).* But the Framers never contemplated that the Clause would limit the legislative power of States to enact laws creating duties [***744] that might burden some individuals in order to benefit others.

The widespread dissatisfaction with the Articles of Confederation and, thus, the adoption of our Constitution, was largely a result of the mass of legislation enacted by various States during our earlier national period to relieve debtors from the obligation to perform contracts with their creditors. The economic depression that followed the Revolutionary War witnessed "an ignoble array of [such state] legislative schemes." *Id., at 427.* Perhaps the most common of these were laws providing for the emission of paper currency, making it legal tender for the payment of debts. In addition, there were "installment laws," authorizing the payment of overdue obligations in several installments over a period of months or even years, rather than in a single lump sum as provided for in a contract; "stay laws," statutes staying or postponing the payment of private debts or temporarily closing the courts; and "commodity payment laws," permitting payments in certain enumerated commodities at a proportion, often three-fourths or four-fifths, of actual value. See *id., at 454-459* (Sutherland, J., dissenting); *Sturges v. Crowninshield, 4 Wheat. 122, 204 (1819);* see also B. Wright, The Contract Clause of the [*257] Constitution 4 (1938); Hale, The Supreme Court and the Contract Clause, *57 Harv. L. Rev. 512-513 (1944).*

Thus, the several provisions of Art. I, § 10, of the Constitution -- "No State shall . . . coin Money; emit Bills of Credit; [**2729] make any Thing but gold and silver Coin a Tender in Payment of Debts; [or] pass any . . . Law impairing the Obligation of Contracts . . . ." -- were targeted directly at this wide variety of debtor relief measures. Although the debates in the Constitutional Convention and the subsequent public discussion of the Constitution are not particularly enlightening in determining the scope of the Clause, they support the view that the sole evil at which the Contract Clause was directed was the theretofore rampant state legislative interference with the ability of creditors to obtain the payment or security provided for by contract. The Framers regarded the Contract Clause as simply an adjunct to the currency provisions of Art. I, § 10, which operated primarily to bar legislation depriving creditors of the payment of the full value of their loans. See Wright, *supra,* at 5-16. The Clause was thus intended by the Framers to be applicable only to laws which altered the obligations of contracts by effectively relieving one party of the obligation to perform a contract duty. n5

n5 Of course, as our recent decisions make plain, the applicability of the Clause has not been confined to classic "debtor relief" laws, but has been regarded as implicated by any measure which dilutes or nullifies a duty created by a contract. See, *e. g., El Paso v. Simmons, 379 U.S. 497 (1965).*

B

The terms of the Contract Clause negate any basis for its interpretation as protecting all contract-based expectations from unjustifiable interference. [***745] It applies, as confirmed by consistent judicial interpretations, only to *state legislative* Acts. See generally *Tidal Oil Co.* v. *Flanagan, 263 U.S. 444 (1924).* Its inapplicability to impairments by state judicial acts or by national legislation belies interpretation of the Clause as [*258] intended broadly to make all contract expectations inviolable. Rather, the only possible interpretation of its terms, especially in view of its history, is as a limited prohibition directed at a particular, narrow social evil, likely to occur only through state legislative action. This evil is identified with admirable precision: "[Laws] *impairing* the Obligation of Contracts." (Emphasis supplied.) It is nothing less than an abuse of the English language to interpret, as does the Court, the term "impairing" as including laws which create new duties. While such laws may be conceptualized as "enlarging" the obligation of a contract when they add to the burdens that had previously been imposed by a private agreement, such laws cannot be prohibited by the Clause because they do not dilute or nullify a duty a person had previously obligated himself to perform.

Early judicial interpretations of the Clause explicitly rejected the argument that the Clause applies to state legislative enactments that enlarge the obligations of contracts. *Satterlee v. Matthewson, 2 Pet. 380 (1829),* is the leading case. There, this Court rejected a claim that a state legislative Act which gave validity to a contract which the state court had held, before the enactment of the statute, to be invalid at common law could be said to have "impaired the obligation of a contract." It reasoned that "all would admit the retrospective character of [the particular state] enactment, and that the effect of it was to

create a contract between parties where none had previously existed. But it surely cannot be contended, that to create a contract, and to destroy or impair one, mean the same thing." *Id., at 412-413.* n6 Since *creating* an obligation where none had existed previously is not an *impairment* of contract, it of course should follow necessarily that [*259] legislation increasing the obligation of an existing contract is not an impairment. n7 See Hale, *supra*, at 514-516.

n6 *Satterlee*, which was written by Mr. Justice Washington, necessarily rejected the contrary dictum of *Green v. Biddle, 8 Wheat. 1, 84 (1823),* another of Mr. Justice Washington's Court opinions.

n7 In *Georgia R. & Power Co.* v. *Decatur, 262 U.S. 432 (1923), Detroit United R. Co.* v. *Michigan, 242 U.S. 238 (1916),* and in dictum in other cases, see *ante*, at 244-245, n. 16, this Court embraced, without any careful analysis and without giving any consideration to *Satterlee v. Matthewson, 2 Pet. 380 (1829),* the contrary view that the impairment of a contract may consist in "adding to its burdens" as well as in diminishing its efficacy. *Georgia R. & Power Co.* v. *Decatur, supra, at 439.* These opinions reflect the then-prevailing philosophy of economic due process which has since been repudiated. See *Ferguson v. Skrupa, 372 U.S. 726 (1936).* In my view, the reasoning of *Georgia R. & Power Co.* and *Detroit United R. Co.* is simply wrong.

[**2730] C

The Court seems to attempt to justify its distortion of the meaning of the Contract Clause on the ground that imposing new duties on one party to a contract can upset his contract-based expectations as much as can laws that effectively relieve [***746] the other party of any duty to perform. But it is no more anomalous to give effect to the term "impairment" and deny a claimant protection under the Contract Clause when new duties are created than it is to give effect to the Clause's inapplicability to acts of the National Government and deny a Contract Clause remedy when an Act of Congress denies a creditor the ability to enforce a contract right to payment. Both results are simply consequences of the fact that the Clause does not protect all contract-based expectations.

More fundamentally, the Court's distortion of the meaning of the Contract Clause creates anomalies of its own and threatens to undermine the jurisprudence of property rights developed over the last 40 years. The Contract Clause, of course, is but one of several clauses in the Constitution that protect existing economic values from governmental interference. The Fifth Amendment's command that "private property [shall not] be taken for public use, without just [*260] compensation" is such a clause. A second is the Due Process Clause, which during the heyday of substantive due process, see *Lochner v. New York, 198 U.S. 45 (1905),* largely supplanted the Contract Clause in importance and operated as a potent limitation on government's ability to interfere with economic expectations. See G. Gunther, Cases and Materials on Constitutional Law 603-604 (9th ed. 1975); Hale, The Supreme Court and the Contract Clause: III, *57 Harv. L. Rev. 852, 890-891 (1944).* Decisions over the past 50 years have developed a coherent, unified interpretation of all the constitutional provisions that may protect economic expectations and these decisions have recognized a broad latitude in States to effect even severe interference with existing economic values when reasonably necessary to promote the general welfare. See *Penn Central Transp. Co.* v. *New York City, ante*, p. 104; *Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974); Goldblatt v. Hempstead, 369 U.S. 590 (1962); Sproles v. Binford, 286 U.S. 374 (1932); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).* At the same time the prohibition of the Contract Clause, consistently with its wording and historic purposes, has been limited in application to state laws that diluted, with utter indifference to the legitimate interests of the beneficiary of a contract duty, the existing contract obligation, *W. B. Worthen Co.* v. *Kavanaugh, 295 U.S. 56 (1935);* see *United States Trust Co.* v. *New Jersey, 431 U.S. 1 (1977);* cf. *El Paso v. Simmons, 379 U.S. 497 (1965); Home Building & Loan Assn.* v. *Blaisdell, 290 U.S. 398 (1934).*

Today's conversion of the Contract Clause into a limitation on the power of States to enact laws that impose duties additional to obligations assumed under private contracts must inevitably produce results difficult to square with any rational conception of a constitutional order. Under the Court's opinion, any law that may be characterized as "superimposing" new obligations on those provided for by contract is to be [*261] regarded as creating "sudden, substantial, and unanticipated [***747] burdens" and then to be subjected to the most exacting scrutiny. [**2731] The validity of such a law will turn upon whether judges see it as a law that deals with a generalized social problem, whether it is temporary (as few will be) or permanent, whether it operates in an area previously subject to regulation, and, finally, whether its duties apply to a broad class of persons. See *ante*, at 249-250. The necessary consequence of the extreme malleability of these rather vague criteria is to vest judges with broad subjective discretion to protect property interests that happen to appeal to them. n8

n8 With respect, the Court's application of these criteria illustrates this point. First, I find it difficult to understand how the Court can assert that the Act's attempt to protect the expectation interests of employees to pension plans does not deal with a "broad, generalized . . . social problem" but that the mortgage moratorium in *Home Building & Loan Assn.* v. *Blaisdell, 290 U.S. 398 (1934),* did. The Court's suggestion that the Act has a "narrow aim" because it applies only to pension plans overlooks that it is the existence of the pension plan that creates the need for this legislation. Second, the assertion that Minnesota here "invaded an area never before subject to regulation" takes an exceedingly restrictive view of the subject matter of the Act. If it is regarded not as a private pension plan, but rather as the compensation afforded employees by large employers, then the statute operates in an area that has been extensively regulated. The only explanation for the Court's decision is that it subjectively values the interests of employers in pension plans more highly than it does the legitimate expectation interests of employees.

To permit this level of scrutiny of laws that interfere with contract-based expectations is an anomaly. There is nothing sacrosanct about expectations rooted in contract that justify according them a constitutional immunity denied other property rights. Laws that interfere with settled expectations created by state property law (and which impose severe economic burdens) are uniformly held constitutional where reasonably related to the promotion of the general welfare. *Hadacheck v. Sebastian, 239 U.S. 394 (1915)* is illustrative. There a property owner had established on a particular parcel [*262] of land a perfectly lawful business of a brickyard, and, in reliance on the existing law, continued to operate that business for a number of years. However, a local ordinance was passed prohibiting the operation of brickyards in the particular locale and diminishing the value of the claimant's parcel and thus of his investment by nearly 90%. Notwithstanding the effect of the ordinance on the value of the investment, the ordinance was sustained against a taking claim. See also *Miller v. Schoene, 276 U.S. 272 (1928)* (statute required cutting down ornamental red cedar trees because they had cedar rust which would be harmful to apple trees in the vicinity).

There is no logical or rational basis for sustaining the duties created by the laws in *Miller* and *Hadacheck*, but invalidating the duty created by the Minnesota Act. Surely, the Act effects no greater interference with reasonable reliance interests than did these other laws. Moreover, the laws operate identically: They all create duties that burden one class of persons and benefit another. The only difference between the present case and *Hadacheck* or *Miller* is that here there was a prior contractual relationship between the members of the benefited and burdened classes. I simply cannot accept [***748] that this difference should possess constitutional significance. The only means of avoiding this anomaly is to construe the Contract Clause consistently with its terms and the original understanding and hold it is inapplicable to laws which create new duties.

III

But my view that the Contract Clause has no applicability whatsoever to the Minnesota Act does not end the inquiry in this case. The Due Process Clause of the Fourteenth Amendment limits a State's power to enact such laws and I therefore address that related challenge to the Act's validity. n9 [**2732] I think that any claim based on due process has no merit.

n9 I recognize that the only question presented by appellant is whether the Minnesota Act violates the Contract Clause. See Jurisdictional Statement 2. However, I think that a due process claim is fairly subsumed by the question presented and, under the circumstances, elementary fairness requires that I address the due process claim. This reasoning does not apply to the other possible challenges to the Act -- *e. g.*, ones based on the "Taking" Clause or on the Commerce Clause -- for these others involve rather different considerations from those involved in the Contract and Due Process Clause analyses.

[*263] My conclusion rests to a considerable extent upon *Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).* That case involved a federal statute that required the operators of coal mines to compensate employees who had contracted pneumoconiosis even though the employees had terminated their work in the coal-mining industry before the Act was passed. This federal statute imposed a new duty on operators based on past acts and applied even though the coal mine operators might not have known of the danger that their employees would contract pneumoconiosis at the time of the particular employees' service. *Id., at 17;* see also *id., at 40 n. 4* (POWELL, J., concurring in part). While indicating that the Due Process Clause may place greater limitations on the Government's power to legislate retrospectively than it does on the Government's ability to act prospectively, the statute was upheld on the ground that Congress had broad discretion to deal with the serious social problem of pneumoconiosis affecting former miners and that it was "a rational measure to spread the costs of the em-

ployees' disabilities to those who have profited from the fruits of their labor -- the operators and the coal consumers." *Id., at 18.*

A similar analysis is appropriate here. The Act is an attempt to remedy a serious social problem: the utter frustration of an employee's expectations that can occur when he is terminated because his employer closes down his place of work. The burden on his employer is surely far less harsh than that saddled upon coal operators by the federal statute. Too, a large part of the employer's outlay that the Act requires will be offset against future savings. To this extent, the Act merely [*264] prevents the employer from obtaining a windfall, an effect which would immunize this aspect of the statutory requirement from attack even under the more stringent standards the Court reads into the Contract Clause. See *El Paso v. Simmons, 379 U.S., at 515* and cases [***749] cited. To the extent the Act does more than prevent a windfall, it is simply implementing a reasonable legislative judgment that the expectation interests of employees of more than 10 years' service in the receipt of a pension but who, as an actuarial matter, would not satisfy the vesting requirements of the pension plan, should not be frustrated by the generally unforeseen contingency of a plant's closing.

Significantly, also, the Minnesota Act, unlike the federal statute upheld in *Turner Elkhorn Mining*, is not wholly retrospective in its operation. The Act requires an outlay from an employer like appellant only if after the enactment date of the Act (thus when it may give full consideration to the economic consequences of its decision) the employer decides to close its plant.

Nor, finally, do I believe it relevant that the Act is limited in coverage to large employers. "In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt." *Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 519-520 (1937).*

In sum, in my view, the Contract Clause has no applicability whatsoever to the Act, and because I conclude the Act is consistent with the only relevant constitutional restriction -- the Due Process Clause -- I would affirm the judgment of the District Court.

REFERENCES: Return To Full Text Opinion
State's exercise of police power as constituting impairment of obligation of private contract in violation of contract clause (Art I, 10, cl 1) of Federal Constitution

16 Am Jur 2d, Constitutional Law 438, 450

USCS, Constitution, Article I, Section 10, Clause 1

US L Ed Digest, Constitutional Law 271

ALR Digests, Constitutional Law 203

L Ed Index to Annos, Impairment of Contract Obligations

ALR Quick Index, Impairment of Contract Obligations

Federal Quick Index, Impairment of Contract Obligations

Annotation References:

State's exercise of a police power as constituting impairment of obligation of private contract in violation of contract clause (Art I, 10, cl 1) of *Federal Constitution. 57 L Ed 2d 1279.*

EXHIBIT D

WEST COAST HOTEL CO. v. PARRISH ET AL.

No. 293

SUPREME COURT OF THE UNITED STATES

300 U.S. 379; 57 S. Ct. 578; 81 L. Ed. 703; 1937 U.S. LEXIS 1119; 1 Lab. Cas. (CCH) P17,021; 8 Ohio Op. 89; 108 A.L.R. 1330; 1 L.R.R.M. 754; 7 L.R.R.M. 754

December 16, 17, 1936, Argued
March 29, 1937, Decided

PRIOR HISTORY:

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

This was an appeal from a judgment for money directed by the Supreme Court of Washington, reversing the trial court, in an action by a chambermaid against a hotel company to recover the difference between the amount of wages paid or tendered to her as per contract, and a larger amount computed on the minimum wage fixed by a state board or commission.

DISPOSITION:

185 Wash. 581; 55 P. 2d 1083, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner employer sought review of the decision of the Supreme Court of Washington, which held that the Minimum Wages for Women Act (Act), 1913 Wash. Laws 174, was constitutional. The employer contended that the Act violated the Due Process Clause of the Fourteenth Amendment.

OVERVIEW: A female employee filed an action for back wages under the Washington Minimum Wages for Women Act. The Supreme Court held that the Act did not violate the Due Process Clause of the Fourteenth Amendment because it was a valid exercise of the state's police power to protect the health and safety of women. The Court reasoned that the state had a valid interest in the wages paid to women because their support would fall on the state if women were not paid adequate wages. The Court specifically overruled a case relied on by the employer which held that minimum wages laws for women were an unconstitutional burden on the right to contract. The Court reasoned that the case could not stand because employers and employees did not stand on equal footing in the contract process, and the state's interest in the protection of women was valid. The Court held that equal protection was not violated because there was no doctrinal requirement that required the legislation to be couched in all-embracing terms. The Act was directed at a social position unique to women, so the Act did not constitute arbitrary discrimination.

OUTCOME: The judgment of the state supreme court in favor of the employee was affirmed.

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Minimum Wage
[HN1] Washington State's Minimum Wages for Women Act, 1913 Wash. Laws 174, authorizes the fixing of minimum wages for women and minors.

Labor & Employment Law > Wage & Hour Laws > Minimum Wage
[HN2] See 1913 Wash. Laws 174.

Governments > Courts > Judicial Precedents
Labor & Employment Law > Wage & Hour Laws > Minimum Wage
[HN3] The meaning of a minimum wage statute as fixed by a decision of a state's highest court must be accepted by the Supreme Court of the United States as if the meaning is specifically expressed in the enactment.

Civil Procedure > Appeals > U.S. Supreme Court Review > State Court Decisions

[HN4] The United States Supreme Court confines itself to the ground upon which a writ of certiorari was asked or granted.

Constitutional Law > Substantive Due Process > Scope of Protection

[HN5] The United States Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

Constitutional Law > Congressional Duties & Powers > Contracts Clause
Constitutional Law > Substantive Due Process > Scope of Protection

[HN6] Freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

Constitutional Law > Congressional Duties & Powers > Contracts Clause
Constitutional Law > Substantive Due Process > Scope of Protection

[HN7] The power under the United States Constitution to restrict freedom of contract may be exercised in the public interest with respect to contracts between an employer and an employee.

Governments > State & Territorial Governments > Police Power

[HN8] In dealing with the relation of an employer and the employed, a state's legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.

Labor & Employment Law > Wage & Hour Laws > Overtime & Work Period
Governments > State & Territorial Governments > Police Power

[HN9] A state has the constitutional authority to limit the working hours of women.

Governments > Legislation > Interpretation

[HN10] An act is presumed to be constitutional to the extent it deals with a subject within the scope of a state's police power, in the absence of any factual foundation in the record indicating that the limits of the state's power has been transcended.

Governments > Legislation > Interpretation
Governments > State & Territorial Governments > Police Power
Constitutional Law > Substantive Due Process > Scope of Protection

[HN11] If laws that regulate the use of private property and of the making of private contracts have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied and the courts are both incompetent and unauthorized to deal with the wisdom of the policy adopted or with the adequacy or practicability of the law. The legislature is primarily the judge of the necessity of such an enactment. Every possible presumption is in favor of such law's validity must be given. Even though a court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

Constitutional Law > Equal Protection > Scope of Protection
Constitutional Law > Equal Protection > Gender & Sex

[HN12] A legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. There is no doctrinaire requirement that the legislation should be couched in all embracing terms. This principle applies to legislation which singles out women and particular classes of women in the exercise of a state's protective power.

Labor & Employment Law > Wage & Hour Laws > Minimum Wage
Constitutional Law > Equal Protection > Gender & Sex
[HN13] The case of *Adkins v. Children's Hospital, 261 U.S. 525 (1923),* is overruled.

LAWYERS' EDITION HEADNOTES: [***HN1]

CONSTITUTIONAL LAW, § 726
due process -- minimum wage legislation. --

Headnote: [1]
A state statute authorizing the fixing of reasonable minimum wages for women and minors by state authority which shall be adequate for the decent maintenance of women workers, upon the recommendation of a conference composed of representatives of employers and employees and of the public, and permitting the employment under special license of women who are physically defective or crippled by age or otherwise at less than the prescribed minimum wage, is not repugnant to the due process clause of the Federal Constitution.

[***HN2]

CONSTITUTIONAL LAW, § 859
police power -- reasonableness of exercise. --

Headnote: [2]
The reasonableness of the exercise of the police power of the state must be considered in the light of current economic conditions.

[***HN3]

CONSTITUTIONAL LAW, § 525
liberty safeguarded by due process clause. --

Headnote: [3]
In forbidding the deprivation of liberty without due process of law, the Constitution does not recognize an absolute and uncontrollable liberty, the liberty safeguarded being liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people.

[***HN4]

CONSTITUTIONAL LAW, § 513
reasonable regulations as due process. --

Headnote: [4]
Regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process within the meaning of the provisions of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law.

[***HN5]

COURTS, § 103
inquiry into wisdom of legislation. --

Headnote: [5]
Even if the wisdom of a statute be regarded as debatable and its effects uncertain, such matters are for the judgment of the legislature and not of the courts.

[***HN6]

EVIDENCE, § 33
judicial notice -- current economic conditions. --

Headnote: [6]
The Supreme Court will take judicial notice of the existence of demands for relief occasioned by economic depression.

[***HN7]

CONSTITUTIONAL LAW, § 325
arbitrariness of minimum wage laws not extending to men. --

Headnote: [7]
Legislation providing for the establishment of minimum wages for women and minors does not constitute an arbitrary discrimination because it does not extend to men.

[***HN8]

CONSTITUTIONAL LAW, § 321
equal protection -- failure to cover whole field. --

Headnote: [8]
Legislative regulation is not discriminatory because it is not extended to all cases which it might possibly reach.

[***HN9]
Previous decision overruled. --

Headnote: [9]
Adkins v. Childrens' Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 294, overruled.

SYLLABUS:

1. Deprivation of liberty to contract is forbidden by the Constitution if without due process of law; but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process. P. 391.

2. In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. P. 393.

3. The State has a special interest in protecting women against employment contracts which through poor working conditions, long hours or scant wages may leave them inadequately supported and undermine their health; because:

(1) The health of women is peculiarly related to the vigor of the race;

(2) Women are especially liable to be overreached and exploited by unscrupulous employers; and

(3) This exploitation and denial of a living wage is not only detrimental to the health and well being of the women affected but casts a direct burden for their support upon the community. Pp. 394, 398, et seq.

4. Judicial notice is taken of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. P. 399.

5. A state law for the setting of minimum wages for women is not an arbitrary discrimination because it does not extend to men. P. 400.

6. A statute of the State of Washington (Laws, 1913, c. 174; Remington's Rev. Stats., 1932, § 7623 *et seq.*) providing for the establishment of minimum wages for women, *held* valid. *Adkins v. Children's Hospital, 261 U.S. 525,* is overruled; *Morehead v. New York ex rel. Tipaldo, 298 U.S. 587,* distinguished. P. 400.

COUNSEL:

Mr. E. L. Skeel, with whom Mr. John W. Roberts was on the brief, for appellant.

The statute was passed in 1913, long before the decision of this Court in the Adkins case. It is in no sense an emergency measure.

It sets up but one standard, that is, the wage must be adequate for the maintenance of the adult woman worker. It does not require that the wage have any relation to the reasonable value of the worker's services. The Adkins case, *261 U.S. 525,* and like cases decided subsequently, condemn such legislation. *Murphy v. Sardell, 269 U.S. 530; Donham v. West-Nelson Mfg. Co., 273 U.S. 657; Morehead v. New York ex rel. Tipaldo, 298 U.S. 587.*

The court below based its decision on two points: (1) That the Adkins case was not binding since the Act there involved was an Act of Congress; and (2) that the legislature and the state court have conclusively determined that the Act is in the public interest.

The power of Congress within the District of Columbia is as broad as that of the State within its own territory.

In any event, the subsequent decisions of this Court dealing with state legislation are directly in point.

The state legislature and the state supreme court cannot deprive a person of his constitutional rights by merely stating that the enactment is made as an exercise of the police power for the correction of an existing evil. *Meyer v. Nebraska, 262 U.S. 399; Minnesota v. Barber, 136 U.S. 313, 319; Buchanan v. Warley, 245 U.S. 60, 74.*

Messrs. C. B. Conner and Sam M. Driver filed a brief on behalf of appellees.

The issue is whether this legislative Act is a valid and reasonable exercise of the police power of the State. The Constitution does not prohibit States from regulating matters for the public welfare, but simply requires that regulations be reasonable and adapted to that end. *Nebbia v. New York, 291 U.S. 592.* The burden rests upon him who assails the Act to show an improper exercise of the legislative power. *Missouri Pacific Ry. Co. v. Norwood, 283 U.S. 249;* Borden's Farm Products v. *Baldwin, 293* U.S. 194.

It is within the province of the legislature to determine what matters and conditions pertaining to the public welfare require attention, and the remedy. *Radice v. New York, 264 U.S. 292.* In passing the minimum wage law, the legislature had under consideration the needs of the people of the State -- the general welfare of the people; and in construing that law the Supreme Court approved the findings of the legislature and determined that the Act passed was in the interest of the general welfare of the community. *Larsen v. Rice, 100 Wash. 642.*

This Court does not inquire into the wisdom of the Act, nor the economic conditions of the State which induced its passage; and unless the Act is entirely beyond the legislative power, it is not subject to constitutional objection. *Nebbia v. New York, 291 U.S. 502; Northern Securities Co. v. United States, 193 U.S. 197; Atkins v.*

Kansas, 191 U.S. 297; O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251, 257, 258.

This law was passed by virtue of the reserved police power of the State of Washington, and having received the approval of the highest court of the State is entitled to approval by this Court. The Adkins case construed an Act of Congress which had received the disapproval of the highest court of the District of Columbia; and we, of course, draw the conclusion that the Act of Congress, not having received the approval of that court, was not a reasonable and proper remedy for a condition existing in the District of Columbia. If the Act of Congress so construed had been upheld by the highest court of the District of Columbia, then this Court would accept that judgment in the absence of any facts to support a contrary conclusion. *Adkins v. Children's Hospital, 261 U.S. 525; Bunting v. Oregon, 243 U.S. 426.*

The presumption of constitutionality must prevail in the absence of any factual foundation in the record for declaring the Act unconstitutional. That is not inconsistent with other decisions of the Supreme Court of the United States. See *Bunting v. Oregon, 243 U.S. 426; O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251.*

Murphy v. Sardell, 269 U.S. 530; Donham v. West-Nelson Mfg. Co., 273 U.S. 657, follow with approval the decisions of the supreme courts of Arizona and Arkansas. So, in New York, a law similar to this one failed to receive the approval of the highest court of that jurisdiction, and this Court approved, sustaining the court of New York (*Morehead v. New York ex rel. Tipaldo, 298 U.S. 587);* but in no case has a decision of the highest court of a State upon a local minimum wage regulation been reversed by the Supreme Court of the United States.

Mr. W. A. Toner, Assistant Attorney General of Washington, with whom Mr. G. W. Hamilton, Attorney General, and Mr. George G. Hannan, Assistant Attorney General, were on the brief, by special leave of Court, on behalf of the State of Washington, as amicus curiae.

It seems very difficult to understand why minimum wages may not be fixed without violating due process, if prices can be fixed without violating due process. Both interfere with liberty to contract. The legislative fixing of a minimum wage is not really different in principle from the legislative determination of hours of service, which is clearly constitutional. *Miller v. Wilson, 236 U.S. 373; Muller v. Oregon, 208 U.S. 412; Bunting v. Oregon, 243 U.S. 426.*

It is the same liberty to contract that is invaded, and the same legislative policy that is involved. The aim of both types of legislation is to create an equality where none existed to prevent employers from making an unfair use of their superior bargaining power. Misuse of bargaining power leads to extortion, and surely a State should be able to legislate against extortion under its police power.

Whether there are adequate reasons for submitting certain types of contracts to the public control depends upon the economic policies of the States. *Nebbia v. New York, 291 U.S. 502, 537.*

To say that the fixing of a minimum wage by the State in any industry is ipso facto arbitrary or discriminatory is to beg the question. Courts are to decide concrete cases. In this case the issue is one arising out of an implied contract. A general principle may be deduced from particular lines of decision, but the categorical assertion that any attempt to fix a minimum wage in industry, due consideration being given to the type involved, is arbitrary and discriminatory, palpably invades the power of the States. Further, it is an assertion by the court of a power not found in the national Constitution nor given therein by inference.

It is submitted that it is impossible to regulate hours and working conditions without vesting in the commission some power with reference to the fixing of wages, otherwise the whole cost of any improvement in conditions or any restrictions as to hours of service might be borne by the employee.

The order in question contains regulations upon both hours and conditions, and wages. It does not appear whether or not the welfare commission based the wages on what was reasonable as between the employer and employee; and considering the law, it must be that the reasonable rate was also sufficient for the decent maintenance of the worker. Otherwise, the commission would have had to fix a higher minimum. Whether it did or did not have to fix a minimum higher than that sufficient for decent maintenance does not appear.

The laws applied in similar cases sustain regulations of similar import, the contract clause forming the sole legitimate basis of appellant's attack upon the constitutionality of the statute. *Holden v. Hardy, 169 U.S. 366.*

The State has various fields in which it has the absolute right to fix wages. It is an employer itself on a vast scale. It exercises supervision over many types of public service concerns, and limits the total amount of wages that may be charged to the public without question. *Acker v. United States, 298 U.S. 426.*

It is necessary for the public welfare that water and light, transportation, health, and sanitary services should be continued; and if wage disputes are to be permitted to interrupt the service, or to embarrass the public generally, it would hardly be open to question that the State

would have power to take whatever measures are necessary to insure continuation of the services.

The same considerations apply in a large measure to hotels. The comfort and convenience of the traveling public require certain standards. Hotels are subject to inspection by public officers. The women who work for the hotels come in direct contact with the guests, and the hotels comply with many standards of sanitation and cleanliness through the maids and housekeepers in their employ.

Inns and innkeepers had been regulated by the law long before the business of insurance was considered.

The statute of Washington is within the police power of the State when applied to fixing a minimum wage for women employees in a hotel.

The courts have recognized a wide latitude for the legislature to determine the necessity for protecting the peace, health, safety, morals and general welfare of the people. Where there is no reasonable ground for supposing that the legislature's determination is not supported by the facts, or that its judgment is one of speculation rather than from experience, its findings are not reviewable. *Powell v. Pennsylvania, 127 U.S. 678; Lawton v. Steele, 152 U.S. 133; Holden v. Hardy, 169 U.S. 366; Jacobson v. Massachusetts, 197 U.S. 11; Muller v. Oregon, 208 U.S. 412; McLean v. Arkansas, 211 U.S. 539; Tanner v. Little, 240 U.S. 369; Radice v. New York, 264 U.S. 292; Block v. Hirsch, 256 U.S. 135; O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251; Missouri Pacific R. Co. v. Norwood, 283 U.S. 249; Mountain Timber Co. v. Washington, 243 U.S. 219; Stephenson v. Binford, 287 U.S. 251, 272; Highland v. Russell Car Co., 279 U.S. 253, 258.*

The health and welfare of women in the performance of physical labor are held so fundamentally to affect the public welfare and to be so much more of an object of public interest and concern, that legislation designed for their special protection has been sustained even when like legislation for men might not be. *Muller v. Oregon, 208 U.S. 412; Riley v. Massachusetts, 232 U.S. 671; Hawley v. Walker, 232 U.S. 718; Bosley v. McLaughlin, 236 U.S. 385; Radice v. New York, 264 U.S. 292.*

What standing has this appellant, in this case, to attack the statute as violating the contract rights of the woman?

Keeping in mind the fact that a hotel or an inn is a business impressed with a public interest; that the present controversy is a private dispute regarding the wages to be paid by a corporation innkeeper to a domestic; that the amount in controversy is only $ 216.19; that no showing is made that payment at the rate prescribed by the welfare committee is unfair or unreasonable, or that it imposes any hardship on the employer, or that its business will be made unprofitable; and that no express contract was shown for a rate of wages different from that prescribed in the rules of the welfare commission, we submit that there is no factual basis for a general attack upon the constitutionality of the statute.

JUDGES:

Hughes, Van Devanter, McReynolds, Brandies, Sutherland, Butler, Stone, Robert, Cardozo

OPINIONBY:

HUGHES

OPINION:

[*386] [**579] [***705] MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

[***HR1] This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

[***706] [HN1] The Act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors. [HN2] Laws of 1913 (Washington) chap. 174; Remington's Rev. Stat. (1932), § § 7623 *et seq.* It provides:

"SECTION 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

"SEC. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ [*387] women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

"SEC. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health [**580] and morals, and which shall be sufficient for the decent maintenance of women."

Further provisions required the Commission to ascertain the wages and conditions of labor of women and minors within the State. Public hearings were to be held.

If after investigation the Commission found that in any occupation, trade or industry the wages paid to women were "inadequate to supply them necessary cost of living and to maintain the workers in health," the Commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public. The conference was to recommend to the Commission, on its request, an estimate of a minimum wage adequate for the purpose above stated, and on the approval of such a recommendation it became the duty of the Commission to issue an obligatory order fixing minimum wages. Any such order might be reopened and the question reconsidered with the aid of the former conference or a new one. Special licenses were authorized for the employment of women who were "physically defective or crippled by age or otherwise," and also for apprentices, at less than the prescribed minimum wage.

By a later Act the Industrial Welfare Commission was abolished and its duties were assigned to the Industrial Welfare Committee consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance, [*388] the Supervisor of Industrial Relations, the Industrial Statistician and the Supervisor of Women in Industry. Laws of 1921 (Washington) c. 7; Remington's Rev. Stat. (1932), § § 10840, 10893.

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $ 14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. *Parrish v. West Coast Hotel Co., 185 Wash. 581; 55 P. 2d 1083.* The case is here on appeal.

The appellant relies upon the decision of this Court in *Adkins v. Children's Hospital, 261 U.S. 525,* which held invalid the District of Columbia Minimum Wage Act, which was attacked under the due process clause of the Fifth Amendment. On the argument at bar, [***707] counsel for the appellees attempted to distinguish the *Adkins* case upon the ground that the appellee was employed in a hotel and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that in one of the cases ruled by the *Adkins* opinion the employee was a woman employed as an elevator operator in a hotel. *Adkins v. Lyons, 261 U.S. 525, at p. 542.*

The recent case of *Morehead v. New York ex rel. Tipaldo, 298 U.S. 587,* came here on certiorari to the New York court, which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the *Adkins* case, and that for that and other reasons the New [*389] York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes, and this Court held that [HN3] the "meaning of the statute" as fixed by the decision of the state court "must be accepted here as if the meaning had been specifically expressed in the enactment." *Id., p. 609.* That view led to the affirmance by this Court of the judgment in the *Morehead* case, as the Court considered that the only question before it was whether the *Adkins* case was distinguishable and that reconsideration of that decision had not been sought. Upon that point the Court said: "The petition for the writ sought review upon the ground that this case [Morehead] is distinguishable from that one [Adkins]. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. [HN4] This court confines itself to the ground upon which the writ was asked or granted . . . Here the review granted was no broader than that sought by the petitioner . . . He is not entitled and does not ask to be heard upon the [**581] question whether the *Adkins* case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar." *Id., pp. 604, 605.*

[***HR2] We think that the question which was not deemed to be open in the *Morehead* case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the *Adkins* case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of [*390] the state court demands on our part a reexamination of the *Adkins* case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. Prior to the decision in the instant case it had twice been held valid by the Supreme Court of the State. *Larsen v. Rice, 100 Wash. 642; 171 Pac. 1037; Spokane Hotel Co.* v. *Younger, 113 Wash. 359; 194 Pac. 595.* The Washington statute [***708] is essentially the same as that enacted in Oregon in the same year. Laws of 1913 (Oregon) chap. 62. The validity of the latter act was sustained by the Supreme Court of Oregon in *Stettler v. O'Hara, 69 Ore. 519; 139 Pac. 743,* and *Simpson v. O'Hara, 70 Ore. 261; 141 Pac. 158.* These cases, after reargument, were affirmed here by an equally divided court, in 1917. *243 U.S. 629.* The law of Oregon thus continued in effect. The District of Columbia Minimum Wage Law (40 Stat. 960) was enacted in 1918. The statute was sustained by the Supreme Court of the District in the *Adkins* case. Upon appeal the Court of Appeals of the District first affirmed that ruling but on rehearing reversed it and the case came before this Court in 1923. The judgment of the Court of Appeals holding the Act invalid was affirmed, but with Chief Justice Taft, Mr. Justice Holmes and Mr. Justice Sanford dissenting, and Mr. Justice Brandeis taking no part. The dissenting opinions took the ground that the decision was at variance with the [*391] principles which this Court had frequently announced and applied. In 1925 and 1927, the similar minimum wage statutes of Arizona and Arkansas were held invalid upon the authority of the *Adkins* case. The Justices who had dissented in that case bowed to the ruling and Mr. Justice Brandeis dissented. *Murphy v. Sardell, 269 U.S. 530; Donham v. West-Nelson Co., 273 U.S. 657.* The question did not come before us again until the last term in the *Morehead* case, as already noted. In that case, briefs supporting the New York statute were submitted by the States of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey and Rhode Island. *298 U.S., p. 604, note.* Throughout this entire period the Washington statute now under consideration has been in force.

[***HR3] [***HR4] The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? [HN5] The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in [**582] the interests of the community is due process.

[*392] This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described: n1

> n1 *Allgeyer v. Louisiana, 165 U.S. 578; Lochner v. New York, 198 U.S. 45; Adair v. United States, 208 U.S. 161.*

"But it was recognized in the cases cited, as in many others, that [HN6] freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills [***709] or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, B. & Q. R. Co.* v. *McGuire, 219 U.S. 549, 567.*

[HN7] This power under the Constitution to restrict freedom of contract has had many illustrations. n2 That it may be exercised in the public interest with respect to contracts [*393] between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (*Holden v. Hardy, 169 U.S. 366);* in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co.* v. *Harbison, 183 U.S. 13);* in forbidding the payment of seamen's wages in advance (*Patterson v. Bark Eudora, 190 U.S. 169);* in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas, 211 U.S. 539);* in prohibiting contracts limiting liability for injuries to employees (*Chicago, B. & Q. R. Co.* v. *McGuire, supra);* in limiting hours of work of employees in manufacturing establishments (*Bunting v. Oregon, 243 U.S. 426);* and in maintaining workmen's compensation laws (*New York Central R. Co.* v. *White, 243 U.S. 188; Mountain Timber Co.* v. *Washington, 243*

U.S. 219). [HN8] In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion [**583] in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, B. & Q. R. Co.* [***710] v. *McGuire, supra, p. 570.*

n2 *Munn v. Illinois, 94 U.S. 113; Railroad Commission Cases, 116 U.S. 307; Willcox v. Consolidated Gas Co., 212 U.S. 19; Atkin v. Kansas, 191 U.S. 207; Mugler v. Kansas, 123 U.S. 623; Crowley v. Christensen, 137 U.S. 86; Gundling v. Chicago, 177 U.S. 183; Booth v. Illinois, 184 U.S. 425; Schmidinger v. Chicago, 226 U.S. 578; Armour & Co.* v. *North Dakota, 240 U.S. 510; National Fire Insurance Co.* v. *Wanberg, 260 U.S. 71; Radice v. New York, 264 U.S. 292; Yeiser v. Dysart, 267 U.S. 540; Liberty Warehouse Co.* v. *Burley Tobacco Growers' Assn., 276 U.S. 71, 97; Highland v. Russell Car Co., 279 U.S. 253, 261; O'Gorman & Young v. Hartford Insurance Co., 282 U.S. 249, 251; Hardware Dealers Insurance Co.* v. *Glidden Co., 284 U.S. 151, 157; Packer Corp.* v. *Utah, 285 U.S. 95, 111; Stephenson v. Binford, 287 U.S. 251, 274; Hartford Accident Co.* v. *Nelson Mfg. Co., 291 U.S. 352, 360; Petersen Baking Co.* v. *Bryan, 290 U.S. 570; Nebbia v. New York, 291 U.S. 502, 527-529.*

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden v. Hardy, supra,* where we pointed out the inequality in the footing of the parties. We said (*Id., 397):*

"The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that [*394] their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

And we added that the fact "that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself." "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. That phase of the subject received elaborate consideration in *Muller v. Oregon (1908), 208 U.S. 412,* where [HN9] the constitutional authority of the State to limit the working hours of women was sustained. We emphasized the consideration that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and that her physical well being "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that "though limitations upon personal and contractual rights may be removed by legislation, there is that in her [*395] disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right." Hence she was "properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained." We concluded that the limitations which the statute there in question "placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor" were "not imposed solely for her benefit, but also largely for the benefit of all." Again, in *Quong Wing v. Kirkendall, 223 U.S. 59, 63,* in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a "fictitious equality." We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the State. In later rulings this Court sustained the regulation of hours of work of women employees [***711] in *Riley v. Massachusetts, 232 U.S. 671* (factories), *Miller v. Wilson, 236 U.S. 373* (hotels), and *Bosley v. McLaughlin, 236 U.S. 385* (hospitals).

This array of precedents and the principles they applied were thought by the dissenting Justices in the *Ad-*

kins case to demand that the minimum wage statute be [**584] sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. *261 U.S., p. 564.* That challenge persists and is without any satisfactory answer. As Chief Justice Taft observed: "In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to [*396] the one is not greater in essence than the other and is of the same kind. One is the multiplier and the other the multiplicand." And Mr. Justice Holmes, while recognizing that "the distinctions of the law are distinctions of degree," could "perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate." *Id., p. 569.*

One of the points which was pressed by the Court in supporting its ruling in the *Adkins* case was that the standard set up by the District of Columbia Act did not take appropriate account of the value of the services rendered. In the *Morehead* case, the minority thought that the New York statute had met that point in its definition of a "fair wage" and that it accordingly presented a distinguishable feature which the Court could recognize within the limits which the *Morehead* petition for certiorari was deemed to present. The Court, however, did not take that view and the New York Act was held to be essentially the same as that for the District of Columbia. The statute now before us is like the latter, but we are unable to conclude that in its minimum wage requirement the State has passed beyond the boundary of its broad protective power.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the *Adkins* case is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as [*397] the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld." *261 U.S., p. 570.* And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character: "Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large." *Id., p. 563.*

[***712] We think that the views thus expressed are sound and that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. Those principles have been reenforced by our subsequent decisions. Thus in *Radice v. New York, 264 U.S. 292,* we sustained the New York statute which restricted the employment of women in restaurants at night. In *O'Gorman & Young v. Hartford Fire Insurance Co., 282 U.S. 251,* which upheld [HN10] an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation of record for deciding that the limits of power had been transcended. In *Nebbia v. New York, 291 U.S. 502,* [**585] dealing [*398] with the New York statute providing for minimum prices for milk, the general subject of [HN11] the regulation of the use of private property and of the making of private contracts received an exhaustive examination and we again declared that if such laws "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied"; that "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal"; that "times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." *Id., pp. 537, 538.*

[***HR5] With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum

wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," [*399] the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

[***HR6] [***HR7] [***HR8] There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect [***713] to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The [*400] community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. [HN12] The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might [**586] have been applied." There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. *Carroll v. Greenwich Insurance Co., 199 U.S. 401, 411; Patsone v. Pennsylvania, 232 U.S. 138, 144; Keokee Coke Co.* v. *Taylor, 234 U.S. 224, 227; Sproles v. Binford, 286 U.S. 374, 396; Semler v. Oregon Board, 294 U.S. 608, 610, 611.* This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power. *Miller v. Wilson, supra, p. 384; Bosley v. McLaughlin, supra, pp. 394, 395; Radice v. New York, supra, pp. 295-298.* Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

[***HR9] Our conclusion is that [HN13] the case of *Adkins v. Children's Hospital, supra,* should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is

Affirmed.

DISSENTBY:

SUTHERLAND

DISSENT:

MR. JUSTICE SUTHERLAND, dissenting:

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, MR. JUSTICE BUTLER and I think the judgment of the court below should be reversed.

[*401] The principles and authorities relied upon to sustain the judgment, were considered in *Adkins v. Children's Hospital, 261 U.S. 525,* and *Morehead v. New York ex rel. Tipaldo, 298 U.S. 587;* and their lack of application to cases like the one in hand was pointed out. A sufficient answer to all that is now said will be found in the opinions of the court in those cases. Nevertheless, in the circumstances, it seems well to restate our reasons and conclusions.

Under our form of government, where the written Constitution, by [***714] its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been intrusted to this court when the question arises in a controversy within its jurisdiction; and so long as the power remains there, its exercise cannot be avoided without betrayal of the trust.

It has been pointed out many times, as in the *Adkins* case, that this judicial duty is one of gravity and delicacy; and that rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon *him*, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so [*402] important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

The suggestion that the only check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint. This court acts as a unit. It cannot act in any other way; and the majority (whether a bare majority or a majority of all but one of its members), therefore, establishes the controlling rule as the decision of the court, binding, so long as it remains unchanged, equally upon those who disagree and upon those who subscribe to it. Otherwise, orderly [**587] administration of justice would cease. But it is the right of those in the minority to disagree, and sometimes, in matters of grave importance, their imperative duty to voice their disagreement at such length as the occasion demands -- always, of course, in terms which, however forceful, do not offend the proprieties or impugn the good faith of those who think otherwise.

It is urged that the question involved should now receive fresh consideration, among other reasons, because of "the economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of [*403] living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written -- that is, that they do not apply to a situation now to which they would have applied then -- is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.

The words of Judge Campbell in *Twitchell v. Blodgett, 13 Mich. 127, 139-140,* [***715] apply with peculiar force. "But it may easily happen," he said, "that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things.

". . . Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances . . . But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false construction." The principle is reflected in many decisions of this court. See *South Carolina v. United States, 199 U.S. 437, 448-449; Lake County v. Rollins, 130 U.S. 662, 670; Knowlton v. Moore, 178 U.S. 41, 95; Rhode Island v. Massachusetts, 12 Pet. 657, 723; Craig v. Missouri, 4 Pet. 410, 431-432; Ex parte Bain, 121 U.S. 1, 12; Maxwell v. Dow, 176 U.S. 581, 602; Jarrolt v. Moberly, 103 U.S. 580, 586.*

[*404] The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase "supreme law of the land" stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation -- and the only true remedy -- is to amend the Constitution. Judge Cooley, in the first volume of his Constitutional Limitations (8th ed.), p. 124, very clearly pointed out that much of the benefit expected from written constitutions would be lost if their provisions were to be bent to

circumstances or modified by public opinion. He pointed out that the common law, unlike a constitution, was subject to modification by public sentiment and action which the courts might recognize; but that "a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. . . . What a court is to do, therefore, is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent [**588] time when a court has occasion to pass upon it."

The *Adkins* case dealt with an act of Congress which had passed the scrutiny both of the legislative and executive branches of the government. We recognized that [*405] thereby these departments had affirmed the validity of the statute, and properly declared that their determination must be given great weight, but we then concluded, after thorough consideration, that their view could not be sustained. We think it not inappropriate now to add a word on that subject before coming to the question immediately under review.

[***716] The people by their Constitution created three separate, distinct, independent and coequal departments of government. The governmental structure rests, and was intended to rest, not upon any one or upon any two, but upon all three of these fundamental pillars. It seems unnecessary to repeat, what so often has been said, that the powers of these departments are different and are to be exercised independently. The differences clearly and definitely appear in the Constitution. Each of the departments is an agent of its creator; and one department is not and cannot be the agent of another. Each is answerable to its creator for what it does, and not to another agent. The view, therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling.

Coming, then, to a consideration of the Washington statute, it first is to be observed that it is in every substantial respect identical with the statute involved in the *Adkins* case. Such vices as existed in the latter are present in the former. And if the *Adkins* case was properly decided, as we who join in this opinion think it was, it necessarily follows that the Washington statute is invalid.

In support of minimum-wage legislation it has been urged, on the one hand, that great benefits will result in favor of underpaid labor, and, on the other hand, that the danger of such legislation is that the minimum will tend to become the maximum and thus bring down the [*406] earnings of the more efficient toward the level of the less-efficient employees. But with these speculations we have nothing to do. We are concerned only with the question of constitutionality.

That the clause of the Fourteenth Amendment which forbids a state to deprive any person of life, liberty or property without due process of law includes freedom of contract is so well settled as to be no longer open to question. Nor reasonably can it be disputed that contracts of employment of labor are included in the rule. *Adair v. United States, 208 U.S. 161, 174-175; Coppage v. Kansas, 236 U.S. 1, 10, 14.* In the first of these cases, Mr. Justice Harlan, speaking for the court, said, "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars the employer and employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In the *Adkins* case we referred to this language, and said that while there was no such thing as absolute freedom of contract, but that it was subject to a great variety of restraints, nevertheless, freedom of contract was the general rule and restraint the exception; and that the power to abridge that freedom could only be justified by the existence of exceptional circumstances. This statement of the rule has been many times affirmed; and we do not understand that it is questioned by the present decision.

We further pointed out four distinct classes of cases in which this court from time to time had upheld statutory interferences with the liberty of contract. They were, in brief, (1) statutes fixing rates and charges to be [*407] exacted by businesses impressed with a public interest; (2) statutes relating to contracts for the performance of public work; (3) statutes prescribing the character, methods and time for payment of wages; and (4) statutes fixing hours of labor. It is the last class that has been most relied upon as affording support for minimum-wage [**589] [***717] legislation; and much of the opinion in the *Adkins* case *(261 U.S. 547-553)* is devoted to pointing out the essential distinction between fixing hours of labor and fixing wages. What is there said need not be repeated. It is enough for present purposes to say that statutes of the former class deal with an incident of the employment, having no necessary effect upon wages. The parties are left free to contract about wages, and thereby equalize such additional burdens as may be imposed upon the employer as a result of the restrictions as to hours by an adjustment in respect of the amount of

wages. This court, wherever the question is adverted to, has been careful to disclaim any purpose to uphold such legislation as fixing wages, and has recognized an essential difference between the two. *E. g., Bunting v. Oregon, 243 U.S. 426; Wilson v. New, 243 U.S. 332, 345-346, 353-354;* and see Freund, Police Power, § 318.

We then pointed out that minimum-wage legislation such as that here involved does not deal with any business charged with a public interest, or with public work, or with a temporary emergency, or with the character, methods or periods of wage payments, or with hours of labor, or with the protection of persons under legal disability, or with the prevention of fraud. It is, simply and exclusively, a law fixing wages for adult women who are legally as capable of contracting for themselves as men, and cannot be sustained unless upon principles apart from those involved in cases already decided by the court.

Two cases were involved in the *Adkins* decision. In one of them it appeared that a woman 21 years of age, [*408] who brought the suit, was employed as an elevator operator at a fixed salary. Her services were satisfactory, and she was anxious to retain her position, and her employer, while willing to retain her, was obliged to dispense with her services on account of the penalties prescribed by the act. The wages received by her were the best she was able to obtain for any work she was capable of performing; and the enforcement of the order deprived her, as she alleged, not only of that employment, but left her unable to secure any position at which she could make a living with as good physical and moral surroundings and as good wages as she was receiving and was willing to take. The Washington statute, of course, admits of the same situation and result, and, for aught that appears to the contrary, the situation in the present case may have been the same as that just described. Certainly, to the extent that the statute applies to such cases, it cannot be justified as a reasonable restraint upon the freedom of contract. On the contrary, it is essentially arbitrary.

Neither the statute involved in the *Adkins* case nor the Washington statute, so far as it is involved here, has the slightest relation to the capacity or earning power of the employee, to the number of hours which constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment. The sole basis upon which the question of validity rests is the assumption that the employee is entitled to receive a sum of money sufficient to provide a living for her, keep her in health and preserve her morals. And, as we pointed out at some length in that case (pp. 555-557), the question thus presented for the determination of the board can not be solved by any general formula prescribed by a statutory bureau, since it is not a composite but an individual question to be answered for each individual, considered by herself. [*409] What we said further in that case (pp. 557-559), is equally applicable here:

" [***718] The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half [**590] of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

"The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it [*410] exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at

all events to furnish it. The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. [***719] Should a statute undertake to vest in a commission [*411] power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States."

Whether this would be equally or at all true in respect of the statutes of some of the states we are not called upon to say. They are not now before us; and it is enough that it applies in every particular to the Washington statute now under consideration.

The Washington statute, like the one for the District of Columbia, fixes minimum wages for adult women. Adult men and their employers are left free to bargain as they please; and it is a significant and an [**591] important fact that all state statutes to which our attention has been called are of like character. The common-law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal [*412] right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. And it is an arbitrary exercise of the legislative power to do so. In the *Tipaldo* case, *298 U.S. 587, 615,* it appeared that the New York legislature had passed two minimum-wage measures -- one dealing with women alone, the other with both men and women. The act which included men was vetoed by the governor. The other, applying to women alone, was approved. The "factual background" in respect of both measures was substantially the same. In pointing out the arbitrary discrimination which resulted (pp. 615-617) we said:

"These legislative declarations, in form of findings or recitals of fact, serve well to illustrate why any measure that deprives employers and adult women of freedom to agree upon wages, leaving employers and men employees free so to do, is necessarily arbitrary. Much, if not all, that in them is said in justification of the regulations that the Act imposes in respect of women's wages applies with equal force in support of the same regulation of men's wages. While men are left free to fix their wages by agreement with employers, it would be fanciful to suppose that the regulation of women's wages would be useful to prevent or lessen the evils listed in the first section of the Act. Men in need of work are as likely as women to accept the low wages offered by unscrupulous employers. Men in greater number than women support themselves and dependents and because of need will work for whatever wages they can get and that without regard to the value of the service and even though the pay is less than minima prescribed in accordance with this Act. It is plain that, under circumstances such as those portrayed [***720] in the 'Factual background' prescribing of minimum wages for women alone would unreasonably restrain them [*413] in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work."

An appeal to the principle that the legislature is free to recognize degrees of harm and confine its restrictions accordingly, is but to beg the question, which is -- since the contractual rights of men and women are the same, does the legislation here involved, by restricting only the rights of women to make contracts as to wages, create an arbitrary discrimination? We think it does. Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free. Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average

man would lack substance. The ability to make a fair bargain, as everyone knows, does not depend upon sex.

If, in the light of the facts, the state legislation, without reason or for reasons of mere expediency, excluded men from the provisions of the legislation, the power was exercised arbitrarily. On the other hand, if such legislation in respect of men was properly omitted on the ground that it would be unconstitutional, the same conclusion of unconstitutionality is inescapable in respect of similar legislative restraint in the case of women, *261 U.S. 553.*

Finally, it may be said that a statute absolutely fixing wages in the various industries at definite sums and forbidding employers and employees from contracting for any other than those designated, would probably not be thought to be constitutional. It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to [*414] become substantially the same, the right to make any contract in respect of wages will have been completely abrogated.

A more complete discussion may be found in the *Adkins* and *Tipaldo* cases cited *supra.*

REFERENCES: Return To Full Text Opinion

EXHIBIT E

LEXSEE 32 CAL.3D 468

THE PEOPLE, Plaintiff and Appellant, v. JUNE LEORA LOPES SIMS, Defendant and Respondent

Crim. No. 22265

Supreme Court of California

32 Cal. 3d 468; 651 P.2d 321; 186 Cal. Rptr. 77; 1982 Cal. LEXIS 230

September 27, 1982

PRIOR HISTORY:

Superior Court of Sonoma County, No. 9236-C, William B. Boone, Judge.

DISPOSITION:

Accordingly, the trial court's dismissal of the information against respondent is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The state challenged an order of the Superior Court of Sonoma County (California), which dismissed the information against respondent welfare recipient that alleged felony violation of *Cal. Welf. & Inst. Code § 11483* and misdemeanor violation of former *Cal. Welf. & Inst. Code § 18910*, because the California Department of Social Services had determined in an administrative hearing that respondent had not fraudulently obtained welfare benefits.

OVERVIEW: Respondent welfare recipient received a "notice of action" from the county, alleging that she had fraudulently obtained welfare benefits and demanding restitution. After the state filed criminal charges against respondent for violations of *Cal. Welf. & Inst. Code § § 11483* and 18910, based on the same allegations of fraud, the California Department of Social Services held an administrative hearing under *Cal. Welf. & Inst. Code § 19050* and determined that the county had failed to meet its burden of proving welfare fraud. The county had refused to participate, alleging lack of jurisdiction because of the pending criminal charges. The trial court then dismissed the criminal charges based on collateral estoppel. On appeal, the court affirmed the dismissal. Using a three-prong test, the court held that the county had had an opportunity to litigate the issues of fraud, that the adjudicatory administrative hearing resulted in a final judgment on the merits, and that the county and the district attorney were in privity, because they both represented the interests of the state; therefore, the criminal charges were barred by collateral estoppel.

OUTCOME: The court affirmed the trial court's dismissal of the information against respondent welfare recipient for welfare fraud, because collateral estoppel barred relitigation of the issue, as the California Department of Social Services, acting in a judicial capacity in an administrative hearing, had already exonerated respondent of the charges.

LexisNexis(R) Headnotes

Public Health & Welfare Law > Welfare Fraud
[HN1] *Cal. Welf. & Inst. Code § 11483* prescribes criminal penalties for persons who have fraudulently obtained Aid to Families with Dependent Children benefits. The statute incorporates by reference the requirement that restitution shall be sought prior to the bringing of a criminal action.

Public Health & Welfare Law > Welfare Fraud
[HN2] See former *Cal. Welf. & Inst. Code § § 11483*, 12250, and 12850.

Public Health & Welfare Law > Welfare Fraud
[HN3] A criminal prosecution is not barred even though the accused has already made or is in the process of making full restitution.

Public Health & Welfare Law > Welfare Fraud
[HN4] The statutory demand for restitution may not be circumvented by prosecuting an accused for perjury un-

der *Cal. Penal Code § 118* rather than for Assistance for Families with Dependent Children fraud under *Cal. Welf. & Inst. Code § 11483.*

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN5] Collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding. Traditionally, the doctrine has been applied to give conclusive effect in a collateral court action to a final adjudication made by a court in a prior proceeding.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
Civil Procedure > Preclusion & Effect of Judgments > Res Judicata
[HN6] Collateral estoppel is a secondary aspect of the res judicata doctrine. In its primary aspect, res judicata operates as a bar to the maintenance of a second suit between the same parties or parties in privity with them on the same cause of action.

Civil Procedure > Preclusion & Effect of Judgments > Res Judicata
[HN7] Whenever any board, tribunal, or person is by law vested with authority to decide a question, such decision, when made, is res judicata, and as conclusive of the issues involved in the decision as though the adjudication had been made by a court of general jurisdiction.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN8] Collateral estoppel may be applied to decisions made by administrative agencies when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.

Administrative Law > Agency Adjudication > Hearings
[HN9] To ascertain whether an agency acted in a judicial capacity, the federal courts have looked for factors indicating that the administrative proceedings and determination possessed a judicial character.

Administrative Law > Separation & Delegation of Power > Constitutional Controls
[HN10] The fact that statewide and local administrative agencies are prohibited from exercising "judicial power" by the California Constitution does not mean that agency proceedings and determinations may never be judicial in nature. This distinction was not recognized by *Empire Star Mines Co. v. Cal. Emp. Com., 168 P.2d 686 (Cal. 1946),* which is overruled.

Administrative Law > Agency Adjudication > Hearings
[HN11] The decision which involves the application of a rule requiring restitution for fraudulently obtained overpayments to a specific set of existing facts, rather than the formulation of a rule to be applied to all future cases, is adjudicatory in nature.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN12] *Cal. Welf. & Inst. Code § 10962* provides that either party may obtain review of the fair hearing decision under the provisions of *Cal. Civ. Proc. Code § 1094.5.* This method of review is available only where the contested administrative decision is adjudicative in nature.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN13] Collateral estoppel effect is given to final decisions of constitutional agencies such as the Workers' Compensation Appeals Board (formerly the Industrial Accident Commission) and the Public Utilities Commission even though proceedings before these agencies are not conducted according to judicial rules of evidence. The pertinent inquiry is whether the different standard for admitting evidence at the fair hearing deprived the parties of a fair adversary proceeding in which they could fully litigate the issue of respondent's fraud.

Administrative Law > Agency Adjudication > Hearings
Administrative Law > Separation & Delegation of Power > Legislative Controls
[HN14] *Cal. Welf. & Inst. Code § 10950* et seq. authorizes the California Department of Social Services to conduct fair hearings to resolve claims by recipients that they did not commit the welfare fraud with which they are charged.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN15] The failure of a litigant to introduce relevant available evidence on an issue does not necessarily defeat a plea of collateral estoppel. Even a judgment of default in a civil proceeding is res judicata as to all issues

aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN16] Where successive proceedings are different in nature, one criminal and one civil, collateral estoppel may still bar relitigation of an issue decided in the first action.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN17] An adjudication of an issue in a criminal trial may collaterally estop the state from pursuing another criminal prosecution based on the same controversy.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN18] A superior court's granting of a writ of habeas corpus to a petitioner may be binding in a subsequent criminal proceeding. A final order granting relief to a petitioner on habeas corpus is a conclusive determination that he is illegally held in custody and cannot later be relitigated in a criminal prosecution by the state.

Civil Procedure > Jury Trials > Right to Jury Trial
Constitutional Law > State Constitutional Operation & Amendment
[HN19] Cal. Const. art. I, § 16, requires that the prosecutor's consent be obtained before an accused, who has pleaded not guilty to an offense, can waive a jury trial. Even assuming that the state has a separate and independent right to a jury trial, such a right is clearly not absolute. For example, under *Cal. Penal Code § 1118.1*, a trial judge may order the acquittal of the accused before a case is submitted to the jury if the judge finds the evidence to be insufficient to sustain a conviction of the charged offense. A judgment of acquittal entered pursuant to § 1118.1 is a bar to any subsequent prosecution for the same offense. *Cal. Penal Code § 1118.2*. Thus, any right to a jury trial possessed by the state is only a right to submit to a jury issues of fact which are triable. When issues of fact have been conclusively resolved against the state in a prior administrative action, application of collateral estoppel to take those issues from the jury does not violate the state's right to trial by jury.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN20] Collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding if (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN21] Only issues actually litigated in the initial action may be precluded from the second proceeding under the collateral estoppel doctrine. An issue is actually litigated when it is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined. A determination may be based on a failure of proof.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN22] Although fair hearings and criminal prosecutions require different burdens of proof, this fact does not preclude a finding that the issues were identical in the two proceedings. Since a fair hearing is civil in nature, the preponderance of evidence standard has to be met by the county. This burden is not as great as the state's burden at a criminal proceeding where an accused's guilt must be proved beyond a reasonable doubt.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN23] The fact that a director's decision is final for purposes of judicial review does not mean that the decision satisfies the finality requirement for application of collateral estoppel.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN24] Only judgments which are free from direct attack are final and may not be relitigated.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel
[HN25] Privity is essentially a shorthand statement that collateral estoppel is to be applied in a given case; there is no universally applicable definition of privity. The concept refers to a relationship between the party to be estopped and the unsuccessful party in the prior litigation

which is sufficiently close so as to justify application of the doctrine of collateral estoppel.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel

[HN26] The district attorney's office and the county are sufficiently close to warrant applying collateral estoppel. Both entities are county agencies that represent the interests of the State of California at the respective proceedings. The district attorney's office represents the State of California in the name of the "People" at criminal prosecutions. *Cal. Penal Code § 684.* At fair hearings, the county welfare department act as the "agent" of the state. The agents of the same government are in privity with each other, since they represent not their own rights but the right of the government.

Administrative Law > Separation & Delegation of Power > Legislative Controls

[HN27] The California Department of Social Services (formerly entitled the Department of Benefit Payments) is the single state agency with full power to supervise every phase of the administration of public social services. *Cal. Welf. & Inst. Code § 10600. Cal. Welf. & Inst. Code § 10800* assigns responsibility for the local administration of state welfare laws to county boards of supervisors who establish county welfare departments. These departments are governed by extensive regulations promulgated by the Department of Social Services in the Manual of Policy and Procedure.

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel

[HN28] The county and the district attorney are in privity with each other. Accordingly, to the extent that *People v. La Motte, 155 Cal. Rptr. 5 (Cal. Ct. App. 1979),* is inconsistent with this holding, that case is disapproved.

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

Defendant was charged with welfare fraud while administrative charges based on the same alleged misconduct were pending. The county seeking recovery of the alleged overpayments declined to present any evidence at the administrative hearing and the hearing officer concluded that the county had failed to meet its burden of proof, thus exonerating defendant. The trial court thereafter granted defendant's motion to dismiss the criminal charges. (Superior Court of Sonoma County, No. 9236-C, William B. Boone, Judge.)

The Supreme Court affirmed. The court first held that the administrative decision could properly be accorded collateral estoppel effect for purposes of the subsequent criminal prosecution, provided the traditional requirements and policy reasons for applying collateral estoppel were also satisfied, since the administrative hearing was a judicial-like adversary proceeding, since the administrative agency resolved disputed issues of fact properly before it, and since the hearing process provided both parties with an adequate opportunity to fully litigate their claims. Although the hearing was not conducted according to the rules of evidence applicable to judicial proceedings, the court held this difference did not preclude a finding that the administrative agency was acting in a judicial capacity. The court also held that the welfare fraud issue actually litigated in the administrative proceeding was identical to that involved in the criminal prosecution, and that the other technical requirements for application of the collateral estoppel doctrine were also satisfied. Finally, the court held the traditional public policies underlying the doctrine were furthered, since giving conclusive effect to the administrative decision promoted judicial economy, prevented the possibility of inconsistent judgments, and protected the accused from being harassed by repeated litigation. (Opinion by Bird, C. J., with Mosk, Richardson, Newman, Broussard and Reynoso, JJ., concurring. Separate dissenting opinion by Kaus, J.)

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Criminal Law § 188--Dismissal and Discharge--In Furtherance of Justice--Statement of Reasons--When Not Required. --In granting a common law pretrial motion to dismiss a welfare fraud prosecution on grounds that the state failed to comply with statutory restitution requirements (*Welf. & Inst. Code, § 11483*), there is no requirement that the trial court's reasons for granting such motion be set forth in the minutes.

(2) Public Aid and Welfare § 28--Aid to Families With Dependent Children--Eligibility--Fraudulent Representation or Nondisclosure to Obtain Aid--Criminal Prosecutions--Statutory Restitution Requirements. --Although a welfare fraud prosecution is subject to dismissal on grounds that the state failed to comply with statutory restitution requirements (*Welf. & Inst. Code, § 11483*), there are no other circumstances under which dismissal is mandated, so long as such statutory requirements were satisfied before the proceedings were commenced. Thus, a criminal prosecution is

not barred, even though the accused has already made or is in the process of making full restitution or an administrative hearing exonerates the accused of the alleged fraud after the criminal proceedings have commenced.

(3) Judgments § 81--Res Judicata--Collateral Estoppel--Nature of Doctrine. --Collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding.

(4a) (4b) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Proceedings--Welfare Fair Hearing. --An administrative decision exonerating a woman of welfare fraud could properly be accorded collateral estoppel effect for purposes of a subsequent criminal prosecution based on the same alleged misconduct, provided the traditional requirements and policy reasons for applying collateral estoppel were also satisfied, where the administrative hearing conducted pursuant to *Welf. & Inst. Code, § 10950*, was a judicial-like adversary proceeding, where the administrative agency resolved disputed issues of fact properly before it, and where the hearing process provided both parties with an adequate opportunity to fully litigate their claims. Although the hearing was not conducted according to the rules of evidence applicable to judicial proceedings, this difference did not preclude a finding that the administrative agency was acting in a judicial capacity.

(5) Administrative Law § 40--Administrative Actions--Adjudication--Jurisdiction--Administrative Determination and Conclusiveness--Collateral Estoppel--Exercise of Judicial Power. --The fact that statewide and local administrative agencies are prohibited from exercising "judicial power" by the California Constitution does not mean that agency proceedings and determinations may never be judicial in nature, so as to preclude them from having collateral estoppel effect in subsequent court proceedings (overruling *Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal.2d 33 [168 P.2d 686]*, to the extent it is inconsistent).

(6) Jury § 8--Right to Jury Trial and Waiver--Criminal Cases--Rights of Prosecution. --Any right to a jury trial possessed by the state in a criminal prosecution is only a right to submit to a jury triable issues of fact. Thus, when issues of fact have been conclusively resolved against the state in a prior administrative action, application of collateral estoppel to take those issues from the jury does not violate the state's right to trial by jury.

(7) Judgments § 81--Res Judicata--Collateral Estoppel--Actual Litigation of Issues in Initial Proceeding. --In an administrative proceeding before a state agency by which a county sought the recovery of alleged welfare overpayments, the issue of welfare fraud was actually litigated, for purposes of the rule under the collateral estoppel doctrine that only issues actually litigated in an initial proceeding may be precluded from a second proceeding, where such issue was properly raised by the recipient's request for a fair hearing (*Welf. & Inst. Code, § 19050*), where the controversy was submitted to the state agency for a determination on the merits, and where the hearing officer found the county had failed to prove the recipient had fraudulently obtained welfare benefits. The county's failure to present evidence at the hearing did not preclude the fraud issue from being submitted and determined.

(8) Judgments § 83--Res Judicata--Collateral Estoppel--Identity of Issues--In Administrative Proceeding and Criminal Prosecution. --In an administrative proceeding before a state agency by which a county sought the recovery of alleged welfare overpayments, the welfare fraud issue actually litigated therein was identical to that involved in a subsequent criminal prosecution, for purposes of determining whether the administrative decision was entitled to collateral estoppel effect in the criminal prosecution, where the county's notice of action and the criminal information placed the identical factual allegations in issue. Although different burdens of proof were applicable, this fact did not preclude a finding that the issues were identical in the two proceedings, since it followed from the county's failure to prove its allegations by a preponderance of the evidence that it had not satisfied the beyond a reasonable doubt standard. Thus, when the hearing officer ruled in favor of the recipient, he necessarily decided a factual issue identical to the one which was sought to be relitigated in the criminal proceeding.

(9) Judgments § 88--Res Judicata--Collateral Estoppel--Finality of Judgment--Administrative Decision--Time for Judicial Review. --An administrative decision exonerating a woman of welfare fraud charges was entitled to collateral estoppel effect in a subsequent criminal prosecution based on the same charges, even though the criminal information was dismissed before the time for seeking mandamus review of the administrative decision had lapsed (*Welf. & Inst. Code, § 10962*), and even assuming such decision was not then final, where the deadline to petition for mandamus had since passed and judicial review had not been sought. Thus, collateral estoppel barred prosecuting defendant on remand.

(10) Judgments § 84--Res Judicata--Collateral Estoppel--Identity of Parties--County Welfare Department and District Attorney. --A county and a district attorney were in privity with each other for purposes of

determining whether an administrative decision exonerating a woman of county welfare fraud charges was entitled to collateral estoppel effect in a subsequent criminal prosecution based on the same charges, where both entities were county agencies representing the state and where there was a close association between the county and the district attorney in controlling welfare fraud (disapproving *People v. La Motte (1979) 92 Cal.App.3d 604 [155 Cal.Rptr. 5]*, to the extent it is inconsistent).

(11) Public Aid and Welfare § 28--Aid to Families With Dependent Children--Eligibility--Fraudulent Representation or Nondisclosure to Obtain Aid--Criminal Prosecutions--Collateral Estoppel. --An administrative decision exonerating a woman of welfare fraud charges was entitled to collateral estoppel effect in a subsequent criminal prosecution based on the same charges, where the technical requirements for application of the collateral estoppel doctrine were satisfied and where traditional public policies underlying the doctrine were furthered. Giving conclusive effect to the administrative decision promoted judicial economy by minimizing repetitive litigation, prevented the possibility of inconsistent judgments, and protected the accused from being harassed by repeated litigation. Further, the unique statutory scheme governing prosecutions for welfare fraud established a policy in favor of resolving such cases outside the criminal justice system.

COUNSEL:

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Edward P. O'Brien and William D. Stein, Assistant Attorneys General, Gloria F. DeHart and Thomas A. Brady, Deputy Attorneys General, for Plaintiff and Appellant.

Juliana Drous, under appointment by the Supreme Court, for Defendant and Respondent.

Alan Lieberman, Stephen Nielson, Quin Denvir, State Public Defender, and Paul D. Fogel, Deputy State Public Defender, as Amici Curiae on behalf of Defendant and Respondent.

JUDGES:

Opinion by Bird, C. J., with Mosk, Richardson, Newman, Broussard and Reynoso, JJ., concurring. Separate dissenting opinion by Kaus, J.

OPINIONBY:

BIRD

OPINION:

[*472] [**323] [***79] This case presents questions that arise when a welfare recipient who has been exonerated of fraud charges in an administrative [*473] [**324] hearing conducted by the Department of Social Services is subsequently prosecuted in a criminal proceeding for the same alleged misconduct. The most significant issue is whether the doctrine of collateral estoppel bars the prosecution from relitigating in the criminal proceeding issues that were previously resolved in the administrative hearing.

I.

Respondent, June Sims, is a welfare recipient and mother of three children. By letter dated April 11, 1978, the Social Services Department of Sonoma County (County) informed respondent that she had received $ 5,395 in Aid to Families With Dependent Children (AFDC) and $ 1,144 in food stamp benefits to which she was not entitled. The letter claimed that respondent had failed to report that the children's [***80] stepfather, Charles Sims, was fully employed and living at home while respondent received public assistance from December of 1976 to April of 1978. The letter also demanded that respondent make restitution for the benefits alleged to have been fraudulently obtained. Respondent agreed to repay the County at a rate of $ 50 per month.

On May 2, 1978, the County prepared a "Notice of Action" against respondent. The notice proposed to reduce future cash grants to respondent to compensate for the alleged overpayments. On August 22, 1978, respondent filed a request for a "fair hearing" pursuant to *Welfare and Institutions Code section 19050* to challenge the propriety of the County's action. n1

n1 Unless otherwise indicated, all statutory references are to the Welfare and Institutions Code.

Prior to the date that respondent requested a fair hearing, a criminal complaint had been filed against her in municipal court. The complaint was based on the same allegations of fraud that were the subject of the County's "Notice of Action." On September 25, 1978, the prosecution charged respondent by information with a felony violation of section 11483 (unlawfully obtaining AFDC for children not entitled to such aid) and a misdemeanor violation of former section 18910 (fraudulently acquiring food stamps). n2 Respondent was arraigned on October 12th and pleaded not guilty.

n2 Section 18910 was repealed and replaced by *Penal Code section 396.* (Stats. 1979, ch. 1170, § § 3, 15, pp. 4561, 4567.)

[*474] On November 29, 1978, while the criminal charges were pending, respondent's fair hearing was held before a hearing officer of the California Department of Social Services (DSS). The County declined to present any evidence against respondent at the hearing. It contended that the DSS lacked jurisdiction to hear the case since criminal charges were still pending in the superior court. Respondent submitted the County's investigation report to the hearing officer and presented evidence to disprove the allegation of fraud. Charles Sims testified that during the time in question he lived at addresses other than that of respondent.

The hearing officer concluded that the DSS did have jurisdiction to hear the case and that the County had failed to meet its burden of proving that respondent had fraudulently obtained welfare benefits. The County was ordered to rescind its "Notice of Action" against respondent and refund any restitution payments respondent had made.

The director of the DSS adopted the fair hearing result on February 7, 1979. The County did not file with the director a request for a rehearing, nor did it seek judicial review of the decision.

Subsequently, respondent moved to dismiss the criminal charges pending against her in superior court. Respondent argued that the administrative finding that she had not received any overpayments rendered the County's restitution demand of April 11, 1978, void. Therefore, the requirement of section 11483 that a demand for restitution be made before a recipient accused of welfare fraud is prosecuted was not met. In the alternative, respondent claimed that the fair hearing decision barred the criminal [**325] prosecution under the doctrine of collateral estoppel.

The trial court granted respondent's motion on May 9, 1979, and dismissed the information. **(1)** (See fn. 3.) The state appealed this dismissal. n3

n3 The prosecution characterizes the trial court's decision as being a dismissal in "furtherance of justice" pursuant to *Penal Code section 1385.* It argues that as such, the dismissal must be reversed, since no reasons for the dismissal were set forth by the trial judge in "an order entered upon the minutes." (*Pen. Code, § 1385*; *People v. Orin (1975) 13 Cal.3d 937, 943-945 [120 Cal.Rptr. 65, 533 P.2d 193].)* However, the record clearly shows that the trial court did not dismiss the information against respondent under *Penal Code section 1385.* The trial court granted respondent's common law pretrial motion to dismiss which was made pursuant to *People v. McGee (1977) 19 Cal.3d 948, 968,* footnote 9 *[140 Cal.Rptr. 657, 568 P.2d 382].* There is no requirement that the trial court's reasons for granting this type of motion to dismiss be set forth in the minutes.

[*475] [***81] II.

[HN1] Section 11483 prescribes criminal penalties for persons who have fraudulently obtained AFDC benefits. The statute incorporates by reference the requirement that "restitution shall be sought . . . prior to the bringing of a criminal action." n4 In *People v. McGee, supra, 19 Cal.3d 948,* this court held that the state's failure to comply with the statutory restitution requirement was grounds for dismissal of the criminal prosecution. (*Id., at p. 966.)*

n4 At the time that the state's prosecution of respondent was commenced, section 11483 provided in pertinent part that "[all] [HN2] actions necessary to secure restitution shall be brought against persons in violation of this section as provided in sections 12250 and 12850." Sections 12250 and 12850, which concerned the fraudulent obtaining of other types of public assistance, each contained the following language as a concluding paragraph: "It is the intent of the Legislature that restitution shall be sought by request, civil action, or other suitable means prior to the bringing of a criminal action." Although sections 12250 and 12850 were repealed in 1973, the incorporation of their language by section 11483 was not affected. (*People v. McGee, supra, 19 Cal.3d at p. 958, fn. 3; People v. Jordan (1978) 86 Cal.App.3d 529, 531, fn. 1 [150 Cal.Rptr. 334].)*

Section 11483 was amended in 1979 so that now an attempt to secure restitution prior to bringing a criminal action is only required where a person is charged with failing to report not more than $ 2,000 of income or resources or failing to report the presence of one additional person or persons in the household. (Stats. 1979, ch. 1170, § 12, p. 4566; Stats. 1979, ch. 1171, § 1, p. 4568.) This amendment has no bearing on the instant case.

Here, respondent received a letter demanding restitution for overpayments in AFDC and food stamp benefits three months prior to the date the criminal complaint was filed. Respondent contends, however, that the subsequent fair hearing determination that no overpayments had been made rendered the request for restitution void. Therefore, under *McGee*, the information was correctly dismissed.

The purpose of the demand for restitution requirement is to give "limited protection to those accused of welfare fraud." (*Id.*, at p. 965.) The accused "[has] an early opportunity to make restitution and, thereby, possibly obtain favorable consideration by the prosecuting authorities." (*Id.*, at p. 964.) After restitution is sought, the prosecutor must make an evaluation of the circumstances of the case, including the nature of the accused's response to the restitution demand.

(2) Once the evaluation of the case is completed, however, the prosecutor is "free to determine whether or not criminal proceedings should [*476] thereafter be pursued." (*Id.*, at p. 965.) There are no circumstances under which *McGee* mandates that the prosecution be dismissed so long as the statutory requirements were satisfied before the proceedings were commenced. For example, [HN3] a criminal prosecution is not barred even though the accused has already made or is in the process of making full restitution. (*People v. Isaac (1976) 56 Cal.App.3d 679, 682 [128 Cal.Rptr. 872]; Madrid v. Justice Court (1975) 52 Cal.App.3d 819, 824 [125* [**326] *Cal.Rptr. 348].)* Similarly, *McGee*, itself, does not require the dismissal of a prosecution when a fair hearing exonerates the accused of the alleged fraud after the criminal proceedings have commenced.

The cases relied on by respondent do not support her contention. In *People v. Harper (1981) 121 Cal.App.3d 283 [175 Cal.Rptr. 146],* the Court of Appeal held that a restitution demand sent to the accused without any subsequent consideration given by the prosecutor to the accused's attempts at restitution amounted to "mechanical compliance" with section 11483 and required dismissal of the prosecution. In *People v. Jenkins (1980) 28 Cal.3d 494, 509 [170 Cal.Rptr. 1, 620 P.2d 587],* this court held that [HN4] the statutory demand for restitution could not be circumvented by prosecuting an accused for perjury under *Penal Code section 118* rather than for AFDC fraud [***82] under section 11483. Neither of these cases provides authority for the position respondent urges this court to take. n5

n5 Respondent was also charged with fraudulently obtaining food stamps in violation of former section 18910. It does not appear that section 18910 contains the same requirement as section 11483 that a demand for restitution be made prior to the initiation of criminal proceedings. Thus, even if this court agreed with respondent that the fair hearing decision voided the prior demand letter, such a holding would not require dismissal of count II of the information alleging a violation of section 18910.

By arguing that the County's demand letter was rendered void by the fair hearing decision, respondent is in effect asking this court to find that the fair hearing decision was a conclusive determination that no overpayment of welfare benefits had been made. That administrative decision should not be binding unless the doctrine of collateral estoppel is applicable. This separate issue is addressed in the next section of the opinion.

III.

The primary issue posed by this appeal is whether the fair hearing decision exonerating respondent of welfare fraud collaterally estopped [*477] the prosecutor from pursuing a criminal action against respondent for the same alleged misconduct.

(3) [HN5] Collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal.2d 601, 604 [25 Cal.Rptr. 559, 375 P.2d 439]; Clark v. Lesher (1956) 46 Cal.2d 874, 880 [299 P.2d 865].)* n6 Traditionally, the doctrine has been applied to give conclusive effect in a collateral court action to a final adjudication made by a court in a prior proceeding. Since the fair hearing decision exonerating respondent of welfare fraud was not a court proceeding, it must be determined initially whether an administrative decision made at a fair hearing may ever be accorded collateral estoppel effect. If this preliminary question is decided affirmatively, then this court must consider whether the traditional requirements and policy reasons for applying collateral estoppel were satisfied by the facts of this case.

n6 [HN6] Collateral estoppel is a "secondary aspect" of the res judicata doctrine. (*Clark v. Lesher, supra, 46 Cal.2d at p. 880.)* In its primary aspect, res judicata operates as a bar to the maintenance of a second suit between the same parties or parties in privity with them on the same cause of action. *(Ibid.; Teitelbaum Furs, Inc.* v. *Dominion Ins. Co., Ltd., supra, 58 Cal.2d at p. 604.)* The court decisions and legal commentators often do not distinguish between the two aspects of the doctrine and refer generally to "res judicata" when discussing whether determinations of ad-

ministrative agencies may be binding in subsequent proceedings.

A.

(4a) Much uncertainty and confusion exist in the case law as to whether the decisions of an administrative agency may ever collaterally estop a later action. "The problem seems to lie in the varying types of administrative agencies and their procedures, and widespread disagreement whether their decisions are judicial, quasi-judicial, or administrative only." (*Williams v. City of Oakland (1973) 30 Cal.App.3d 64, 68 [106 Cal.Rptr.* [**327] *101];* see 2 Cal.Jur.3d, Administrative Law, § 239, pp. 476-478.) It is probably impossible to distinguish or reconcile the numerous cases that span this century. In this case, the court is only concerned with whether a DSS fair hearing decision has binding effect in a collateral criminal proceeding. Case law indicates that there is no absolute bar to according that decision such an effect.

In *Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control (1961) 55 Cal.2d 728, 732 [13 Cal.Rptr. 104, 361 P.2d 712],* this court [*478] quoted from 2 Davis, Administrative Law (1958) section 18.03, page 568: "'The key to a sound solution of problems of res judicata in administrative law is recognition that the traditional principle of res judicata as developed in the judicial system should be fully applicable to some administrative action, that the principle should not be applicable [***83] to other administrative action, and that much administrative action should be subject to a qualified or relaxed set of rules.' [Citations.]"

Hollywood Circle involved an appeal by a corporation to the Alcoholic Beverage Control Appeals Board regarding the revocation of its "on-sale liquor license." The board dismissed the appeal as untimely. Thereafter, the corporation brought a second proceeding before the same board and again sought to establish the timeliness of its appeal. On review by this court of the board's refusal to reconsider the appeal, it was held that the prior determination finding the appeal to be untimely was final and could not be relitigated in the second proceeding. The court reasoned that the decision of the administrative agency was a "purely judicial one . . . . The [res judicata] doctrine applies to such a decision, unless the statute creating the agency authorizes it to reconsider the case." (*Ibid.*)

Although *Hollywood Circle* involved the application of res judicata principles in the context of successive proceedings before the same administrative agency, the holding of that case has not been limited to its facts. In *City and County of San Francisco v. Ang (1979) 97 Cal.App.3d 673 [159 Cal.Rptr. 56],* the Court of Appeal relied on *Hollywood Circle* to bar the relitigation in a collateral civil proceeding of a zoning issue previously decided by a city board of permit appeals. In *Ang*, the board found that defendant's operation of a catering service was permitted by the zoning ordinance governing the district in which the business was located. Subsequently, San Francisco filed suit for an injunction to abate the catering business as a nuisance. The city alleged that its zoning ordinances prohibited the business from operating where it was located. The Court of Appeal held that the board's decision upholding the legality of the operation of the catering service was binding in the nuisance action. The board exercised a quasi-judicial function and had jurisdiction to hear and determine the controversy concerning the claimed zoning violation. "'[*Ordinarily*] at least," the court concluded, "'"[HN7] whenever any board, tribunal, or person is by law vested with authority to decide a question, such decision, when made, is *res judicata*, and as conclusive of the issues involved in the decision as though the adjudication [*479] had been made by a court of general jurisdiction."' [Citation.]" (*Id., at p. 679.)*

In seeking to determine whether a DSS fair hearing decision may have collateral estoppel effect, this court also finds appropriate guidance in *United States v. Utah Constr. Co. (1966) 384 U.S. 394 [16 L.Ed.2d 642, 86 S.Ct. 1545].* There, the United States Supreme Court stated: "Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. [Fn. omitted.]" (*Id., at pp. 421-422 [16 L.Ed.2d at p. 660].)* [HN8] Collateral estoppel may be applied to decisions made by administrative agencies "[when] an administrative agency is *acting in a judicial capacity* and *resolves disputed issues of fact* properly before it which the parties have had an *adequate opportunity to litigate* . . . ." (*Id., at p.* [**328] *422 [16 L.Ed.2d at p. 661],* italics added.) n7 This standard formulated by the Supreme Court is sound, and it comports with the public policy underlying the collateral estoppel doctrine "of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. [Citations.]" (*Bernhard v. Bank of America (1942) 19 Cal.2d 807, 811 [122 P.2d 892].)*

n7 Although the Supreme Court's discussion of collateral estoppel in *Utah Construction* was technically dictum, the federal courts have consistently followed the rule set forth in that case. (Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation (1977) 46 Geo. Wash. L.Rev. 65, 91,* and cases cited therein.)

[HN9] To ascertain whether an agency acted "in a judicial capacity," the federal courts have looked for factors indicating that the administrative proceedings and determination possessed a "'judicial' character." (*Shell Chem. Co., Div. of Shell Oil Co. v. Teamsters L.U. No. 676 (D.N.J. 1973) 353 F.Supp. 480, 485;* [***84] see *also Painters Dist. Coun. No. 38, Etc. v. Edgewood Contracting Co. (5th Cir. 1969) 416 F.2d 1081; Groom v. Kawasaki Motors Corp., USA (W.D.Okla. 1972) 344 F.Supp. 1000.)*

(**5**) (See fn. 8.) Here, the fair hearing conducted by the DSS pursuant to section 10950 was a judicial-like adversary proceeding. n8 (**4b**) Section [*480] 10955 required that the hearing be conducted in an "impartial . . . manner" and that "[all] testimony . . . be submitted under oath or affirmation." The DSS allowed either party to call, examine, and cross-examine witnesses as well as to introduce documentary evidence and make oral or written argument. At the request of the County or respondent, the chief referee was required to subpoena witnesses whose expected testimony would be material or necessary to the case. (DSS, Manual of Policies & Proc., reg. 22-049.6 (hereafter, MPP). n9 It was also required by regulation 22-049.3 that a verbatim record of the testimony and exhibits introduced at the hearing be maintained. In addition, the parties received from the DSS a written statement of the reasons why the hearing officer exonerated respondent of the fraud allegations.

n8 [HN10] The fact that statewide and local administrative agencies are prohibited from exercising "judicial power" by the California Constitution does not mean that agency proceedings and determinations may never be judicial in nature. (*Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29]; Standard Oil Co. v. State Board of Equal. (1936) 6 Cal.2d 557 [59 P.2d 119].)* This distinction was not recognized by *Empire Star Mines Co.* v. *Cal. Emp. Com. (1946) 28 Cal.2d 33 [168 P.2d 686],* upon which the People rely for the proposition that collateral estoppel is not applicable to administrative agency decisions. In *Empire Star Mines*, the court found a decision of the California Employment Commission not to be binding in a subsequent court proceeding because the commission did not exercise "judicial power" under the Constitution. (*Id., at p. 48.)* The court did not determine whether the commission's proceedings were judicial in nature. The analysis of *Empire Star Mines* is inconsistent with that conducted in *Hollywood Circle, Utah Construction*, and the instant case. So that the law is free from ambiguity in this area, *Empire Star Mines* is overruled to the extent that it conflicts with this opinion.

n9 The regulations of the MPP cited in this opinion are those that were in effect on November 25, 1978, the date of respondent's fair hearing. Many of these regulations have since been repealed and replaced. However, the current regulations governing the fair hearing process provide for the same judicial-like adversary proceeding.

Finally, the hearing officer's decision, itself, was adjudicatory in nature. [HN11] The decision involved the application of "a rule [requiring restitution for fraudulently obtained overpayments] to a specific set of existing facts," rather than "the formulation of a rule to be applied to all future cases." (See *Strumsky v. San Diego County Employees Retirement Assn., supra, 11 Cal.3d at pp. 34-35, fn. 2.)* After the decision had been adopted by the director of the DSS, the County had both the right to seek a rehearing before the agency and the right to petition for review in superior court. (§ § 10959, 10962.) n10

n10 [HN12] Section 10962 provides that either party may obtain review of the fair hearing decision under the provisions of *section 1094.5 of the Code of Civil Procedure.* This method of review is available only where the contested administrative decision is adjudicative in nature. (*Anton v. San Antonio Community Hosp. (1977) 19 Cal.3d 802, 814, fn. 9 [140 Cal.Rptr. 442, 567 P.2d 1162]; Strumsky v. San Diego County Employees Retirement Assn., supra, 11 Cal.3d at p. 34, fn. 2.)*

Although [**329] the fair hearing was not conducted according to the rules of evidence applicable to judicial proceedings, this difference does not preclude a finding that the DSS was acting in a "judicial capacity." [HN13] Collateral estoppel effect is given to final decisions of constitutional agencies [*481] such as the Workers' Compensation Appeals Board (formerly the Industrial Accident Commission) and the Public Utilities Commission even though proceedings before these agencies are not conducted according to judicial rules of evidence. (*French v. Rishell (1953) 40 Cal.2d 477, 480-481 [254 P.2d 26]; People v. Western Air Lines, Inc. (1954) 42 Cal.2d 621, 630 [268 P.2d 723];* see 4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, § 159, [***85]

pp. 3303-3304.) The pertinent inquiry is whether the different standard for admitting evidence at the fair hearing deprived the parties of a fair adversary proceeding in which they could fully litigate the issue of respondent's fraud. Clearly, this was not the case.

The second prong of the Supreme Court test, that the agency resolve disputed issues of fact properly before it, was also satisfied by respondent's fair hearing. The disputed issue of fact resolved by the DSS was whether respondent had fraudulently obtained welfare benefits to which she was not entitled. The DSS had jurisdiction to decide this issue. [HN14] Section 10950 et sequitur authorizes the DSS to conduct fair hearings to resolve claims by recipients that they did not commit the welfare fraud with which they are charged. The People do not contend otherwise.

Finally, the fair hearing process provided both the County and respondent with an adequate opportunity to fully litigate their claims before the DSS. That the County failed to present evidence or otherwise participate at the hearing does not prove the contrary. [HN15] The failure of a litigant to introduce relevant available evidence on an issue does not necessarily defeat a plea of collateral estoppel. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd., supra, 58 Cal.2d at p. 607.)* Even a judgment of default in a civil proceeding is "res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint." (*Fitzgerald v. Herzer (1947) 78 Cal.App.2d 127, 132 [177 P.2d 364].)*

What is significant here is that the County had notice of the hearing as well as the opportunity and incentive to present its case to the hearing officer. Respondent was charged with receiving substantial overpayments in excess of $ 6,000. In addition, under the regulations of the MPP, the County had the sole and full responsibility for presenting the case against respondent during the hearing. n11 The People cannot now [*482] take advantage of the fact that the County avoided its litigation responsibilities and chose not to present evidence at the prior proceeding.

n11 Indeed, regulation 22-049.1 provided that "[county] welfare department representation is . . . *required*" at the fair hearing. (Italics added.)

Thus, respondent's fair hearing satisfied each of the criteria of *Utah Construction*. The decision exonerating respondent of fraud may be given collateral estoppel effect. This is true even where, as in this case, the successive proceedings involved are different in nature and the proceeding to be estopped is a criminal prosecution.

The cases recognize that [HN16] where successive proceedings are different in nature, one criminal and one civil, collateral estoppel may still bar relitigation of an issue decided in the first action.

In *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd., supra, 58 Cal.2d 601,* plaintiff corporations [**330] sued their insurance carrier to recover under insurance contracts for losses allegedly caused by a robbery. The insurance company maintained that collateral estoppel barred the plaintiffs' lawsuit. In a prior criminal proceeding, Teitelbaum, the president of the corporations, had been convicted of conspiracy to commit grand theft, attempted grand theft, and filing a false insurance claim with respect to these same losses which the corporations now claimed were caused by a robbery not staged by Teitelbaum. The corporations conceded that they were "mere alter egos" of their president. Finding that the issue adjudicated adversely to Teitelbaum in the criminal action was identical to the issue presented by plaintiffs in the civil suit, this court held that collateral estoppel prevented plaintiffs from relitigating the cause of their loss and entered judgment for the insurance company. (*Id., at pp. 603-604.)*

It has also been found by this court that [HN17] an adjudication of an issue in a criminal [***86] trial may collaterally estop the state from pursuing another criminal prosecution based on the same controversy. (*People v. Taylor (1974) 12 Cal.3d 686 [117 Cal.Rptr. 70, 527 P.2d 622].)* Taylor was the getaway car driver in a liquor store robbery committed by Smith and Daniels. During the robbery, the owner of the store shot and killed Smith. (*Id., at pp. 689-690.)* The state's prosecution of Daniels for Smith's murder resulted in an acquittal. However, in a subsequent prosecution, Taylor was convicted of the same homicide on the theory that he was vicariously liable for the conduct of his confederates. This court reversed the conviction, finding that collateral estoppel precluded the state from prosecuting Taylor. (*Id., at p. 691.)* The court explained that to convict Taylor of the homicide, the prosecutor had to prove that [*483] at least one of Taylor's confederates acted with the requisite malice aforethought during the robbery and shooting. However, the jury at Daniels' trial had found that neither of the confederates harbored malice during the incident. Applying the doctrine of collateral estoppel, the court held that this judgment was conclusive and could not be relitigated by the state at Taylor's trial. (*Id., at pp. 691-692.)* n12

n12 This court has also found that [HN18] a superior court's granting of a writ of habeas cor-

pus to a petitioner may be binding in a subsequent criminal proceeding. (*In re Crow (1971) 4 Cal.3d 613 [94 Cal.Rptr. 254, 483 P.2d 1206].)* In *Crow*, this court stated that "[a] final order . . . granting relief to a petitioner on habeas corpus is a conclusive determination that he is illegally held in custody" and cannot later be relitigated in a criminal prosecution by the state. (*Id., at p. 623.)*

It appears that this court has not before given an administrative agency's determination binding effect on a subsequent criminal proceeding. However, the absence of any decisions involving precisely the same facts as the present case is not, by itself, justification for this court to reject application of the doctrine in this context. **(6)** (See fn. 13.) As in *Taylor*, the inquiry that must be made is whether the traditional requirements and policy reasons for applying the collateral estoppel doctrine have been satisfied by the particular circumstances of this case. n13

n13 *People v. Demery (1980) 104 Cal.App.3d 548 [163 Cal.Rptr. 814]* does not preclude a finding that the fair hearing decision exonerating respondent of welfare fraud has collateral estoppel effect in the criminal prosecution. In *Demery*, the Court of Appeal found that a decision by the State Board of Medical Quality Assurance that the appellant had not violated *Health and Safety Code section 11154* was not binding in a subsequent criminal prosecution for the same offense. The court reasoned that the objective of the hearing before the board differed from that of the criminal trial. The function of the administrative proceeding was merely to police licensing requirements rather than make determinations of guilt or innocence of criminal charges. (*Id., at pp. 560-561.)* Here, however, the function of the DSS fair hearing was virtually identical to that of the criminal trial. The DSS had to determine whether respondent had obtained welfare to which she was not entitled. Only if such a finding was made could the County obtain restitution. Thus, the rationale for not applying collateral estoppel to the decision of the State Board of Medical Quality Assurance is not valid in the circumstances of this case.

Demery also found that applying collateral estoppel to the board decision in the subsequent criminal trial would have defeated the prosecutor's right to a jury trial under article I, section 16 of the California Constitution. The state has never asserted this claim. However, even if such a claim had been raised, this court's resolution of the collateral estoppel issue would not change. The scope of the prosecutor's right to a jury trial in criminal cases is unclear and has never been fully addressed by this court. [HN19] Article I, section 16 requires that the prosecutor's consent be obtained before an accused, who has pleaded not guilty to an offense, can waive a jury trial. (*People v. Washington (1969) 71 Cal.2d 1061, 1086-1087 [80 Cal.Rptr. 567, 458 P.2d 479].)*

Even assuming that the state has a separate and independent right to a jury trial, such a right is clearly not absolute. For example, under *Penal Code section 1118.1*, a trial judge may order the acquittal of the accused before a case is submitted to the jury if the judge finds the evidence to be insufficient to sustain a conviction of the charged offense. A judgment of acquittal entered pursuant to section 1118.1 is a bar to any subsequent prosecution for the same offense. (*Pen. Code, § 1118.2.*) Thus, any right to a jury trial possessed by the state is only a right to submit to a jury issues of fact which are triable. When issues of fact have been conclusively resolved against the state in a prior administrative action, application of collateral estoppel to take those issues from the jury does not violate the state's right to trial by jury.

[*484] [**331] [***87] B.

Traditionally, [HN20] collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding "if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." n14 (*People v. Taylor, supra, 12 Cal.3d at p. 691.)*

n14 The federal courts have also required that in addition to the criteria of *Utah Construction*, the traditional elements of collateral estoppel be met before finding that an administratively determined matter may not be relitigated in a subsequent court proceeding. (Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation, supra*, 46 Geo. Wash. L.Rev. at p. 91.)

(7) It is implicit in this three-prong test that [HN21] only issues actually litigated in the initial action may be precluded from the second proceeding under the collateral estoppel doctrine. (See *Clark v. Lesher, supra, 46 Cal.2d at p. 880.)* An issue is actually litigated "[when] [it] is *properly raised*, by the pleadings or otherwise, and is submitted for determination, and is *determined* . . . . A determination may be based on a *failure of* . . . *proof* . . . ." (*Rest.2d, Judgments (1982) § 27*, com. d, p. 255, italics added.)

Here, the welfare fraud issue was "properly raised" by respondent's request for a fair hearing pursuant to *Welfare and Institutions Code section 19050.* After the fair hearing, the controversy was "submitted" to the DSS for a "determination" on the merits. The hearing officer found that the County had failed to prove that respondent had fraudulently obtained welfare benefits.

Thus, it is clear that respondent's guilt or innocence of welfare fraud was actually litigated at the DSS fair hearing. The County's failure to present evidence at the hearing did not preclude the fraud issue from being "submitted" to and "determined" by the DSS.

[*485] **(8)** The fraud issue actually litigated before the DSS was identical to that involved in the criminal proceedings. At the fair hearing, respondent contested the County's "Notice of Action" which claimed that she had been overpaid $ 5,395 in AFDC benefits and $ 1,144 in food stamp benefits. The notice was based on respondent's alleged failure to report that her children's stepfather was living at home and sharing expenses from December of 1976 to April of 1978.

In the criminal prosecution, the identical factual allegations were in issue. The information charged respondent with fraudulently receiving the same overpayments that were the subject of the County's demand letter and "Notice of Action." In addition, the declaration in support of the complaint alleged that the fraud was committed by respondent's "failing to report a change of persons in the household."

[**332] [HN22] Although fair hearings and criminal prosecutions require different burdens of proof, this fact does not preclude a finding in this case that the issues were identical in the two proceedings. Since a fair hearing is civil in nature, the preponderance of evidence standard had to be met by the County. (Cf. *Pereyda v. State Personnel Board (1971) 15 Cal.App.3d 47, 52 [92 Cal.Rptr. 746].)* This burden is not as great as the state's burden at a criminal proceeding where an accused's guilt must be proved beyond a reasonable doubt. As a result, if the County fails to prove its allegations by a preponderance of the evidence at the fair hearing, it follows a fortiori that it has not satisfied the beyond a reasonable doubt standard.

Thus, when the hearing officer ruled on the merits in respondent's favor at the fair hearing, he "necessarily decided" a factual issue "identical to the one which [was] sought to be relitigated" in the criminal proceeding. (*People v. Taylor, supra, 12 Cal.3d at p. 691.)*

[***88] **(9)** More difficult to resolve is whether the fair hearing determination was final for purposes of applying collateral estoppel. The hearing officer's decision was adopted by the DSS director on February 7, 1979. As of the date the County received notice of the director's decision, it had 30 days to request a rehearing. (§ 10960.) When the 30-day deadline passed without a rehearing having been sought by the County, the director's decision became final for purposes of judicial review. n15 [*486] (§ 10962; see *Taylor v. McKay (1975) 53 Cal.App.3d 644, 649-652 [126 Cal.Rptr. 204]* [by implication].) The County then had one year from the date it received notice of the director's final decision to petition for mandamus review in superior court. (§ 10962.) Thus, on May 9, 1979, when the trial court dismissed the information against respondent, the time period within which the County could seek mandamus review had not yet lapsed.

n15 [HN23] The fact that a director's decision is final for purposes of judicial review does not mean that the decision satisfies the finality requirement for application of collateral estoppel. (See *infra*, at p. 486.)

Respondent urges this court to find that the fair hearing decision was final as of the date it was adopted by the DSS director. Respondent's theory is that on February 7, 1979, the County was required to immediately implement the order included in the adverse administrative decision. (See *Taylor v. McKay, supra, 53 Cal.App.3d at p. 651.)* However, it is a well established rule that [HN24] only judgments which are free from direct attack are final and may not be relitigated. (*Morris v. McCauley's Quality Transmission Service (1976) 60 Cal.App.3d 964, 973 [132 Cal.Rptr. 37];* see 4 Witkin, *supra*, at p. 3307.)

For purposes of this case, it is not necessary to determine whether a DSS fair hearing decision becomes final at any point before the time period for seeking mandamus review lapses. The deadline for the County to petition for mandamus has long since passed and the DSS decision is presently free from direct attack. Thus, even assuming arguendo that the fair hearing decision was not final when the trial court dismissed the information, collateral estoppel would now bar prosecuting respondent upon remand.

(10) With respect to the final requirement for applying collateral estoppel, the state contends that the County and the district attorney are not in privity with each other. They place reliance on *People v. La Motte (1979) 92 Cal.App.3d 604 [155 Cal.Rptr. 5]*, a case which considered a factual situation similar to that involved here. In *La Motte*, the Court of Appeal found that a fair hearing decision absolving an accused of welfare fraud did not bar the district attorney from prosecuting for the same misconduct since the county welfare department was not a party to the criminal proceedings. (*Id., at p. 608.)*

La Motte's analysis of the privity requirement is too simplistic. "[HN25] Privity is essentially a shorthand statement that collateral estoppel is to be applied in a given [**333] case; there is no universally applicable definition of privity." (*Lynch v. Glass (1975) 44 Cal.App.3d 943, 947 [119 Cal.Rptr. 139].)* The concept refers "to a relationship between the party to be estopped [*487] and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel." (*Clemmer v. Hartford Insurance Co. (1978) 22 Cal.3d 865, 875 [151 Cal.Rptr. 285, 587 P.2d 1098];* see also *Lynch v. Glass, supra, 44 Cal.App.3d at p. 948; People* ex rel. *State of Cal. v. Drinkhouse (1970) 4 Cal.App.3d 931, 937 [84 Cal.Rptr. 773]; People v. One 1964 Chevrolet Corvette Convertible (1969) 274 Cal.App.2d 720, 731 [79 Cal.Rptr. 447].)*

Here, [HN26] the district attorney's office, which represents the party to be estopped, and the County, the unsuccessful party in the prior litigation, are "sufficiently close" to warrant applying collateral estoppel. Both entities are county agencies that represented the interests of the State of California at the respective proceedings. The district attorney's office represents the State of California in the name of the "People" at criminal [***89] prosecutions. (See *Pen. Code, § 684.*) At fair hearings, the county welfare department act as the "agent" of the state. n16 "[The] courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government. [Fn. omitted.]" (*Lerner v. Los Angeles City Board of Education (1963) 59 Cal.2d 382, 398 [29 Cal.Rptr. 657, 380 P.2d 97];* see also *Sunshine Coal Co. v. Adkins (1940) 310 U.S. 381, 402-404 [84 L.Ed. 1263, 1275-1277, 60 S.Ct. 907].)*

n16 Under the statutory scheme, [HN27] the DSS (formerly entitled the Department of Benefit Payments) is "the single state agency with full power to supervise every phase of the administration of public social services . . . ." (§ 10600; *Ross v. Superior Court (1977) 19 Cal.3d 899, 907 [141 Cal.Rptr. 133, 569 P.2d 727].)* Section 10800 assigns responsibility for the local administration of state welfare laws to county boards of supervisors who establish county welfare departments. (*Ross v. Superior Court, supra, 19 Cal.3d at 907.)* These departments are governed by extensive regulations promulgated by the DSS in the MPP. Division 22 of the manual specifically governs the department's responsibilities at fair hearings concerning welfare fraud.

The close association between the County and the district attorney's office can also be seen from the fact that the agencies operate jointly in investigating and controlling welfare fraud. Regulation 20-007 of the MPP required the County to establish a special investigative unit (SIU) to investigate suspected welfare fraud and to function as a liaison between the County and law enforcement agencies. The information gathered by the SIU is used by both the County and the district attorney. When evidence of fraud is uncovered, the SIU must request issuance of a criminal complaint from the district attorney and provide him [*488] with all records and reports pertinent to the case. (MPP, reg. 20-007.35.) n17

n17 In this case both the criminal complaint charging respondent with fraud and the declaration filed in support of the complaint were signed by personnel of the DSS.

In addition, an attempt by the County to obtain restitution of overpayments made to a welfare recipient suspected of fraud is sufficient to satisfy the mandate of section 11483 that the district attorney seek restitution before commencing criminal proceedings. (*People v. McGee, supra, 19 Cal.3d at pp. 968-969.)* Finally, when requested, the County must provide documentary evidence to the district attorney and ensure the appearances of investigators and other county officials at hearings and trials. (MPP, reg. 20-005.1.) In view of this close association between the County and the district attorney in controlling welfare fraud, and the fact that both entities are county agencies representing the state, this court finds that [HN28] the County and the district attorney were in privity with each other. n18

n18 Accordingly, to the extent that *People v. La Motte, supra, 92 Cal.App.3d 604,* is inconsistent with this holding, that case is disapproved.

[**334] **(11)** What the above analysis demonstrates is that all of the technical prerequisites for applying collateral estoppel to the fair hearing decision were satisfied. Moreover, estopping the district attorney from prosecuting respondent for welfare fraud would further the traditional public policies underlying application of the doctrine. Giving conclusive effect to the DSS decision exonerating respondent of welfare fraud would promote judicial economy by minimizing repetitive litigation.

In addition, the possibility of inconsistent judgments which may undermine the integrity of the judicial system would be prevented by applying collateral estoppel to the fair hearing decision. Indeed, if the criminal prosecution is allowed to proceed and ultimately results in the respondent's conviction, not only the integrity of the judicial system, but also the integrity of the fair hearing process will be called into question.

The fair hearing is the sole method the Legislature provides for a welfare recipient to challenge the validity of a County determination that benefits have been fraudulently [***90] obtained. If in a subsequent criminal prosecution a DSS decision exonerating the recipient of fraud can be disregarded, the value of the fair hearing determination is substantially diminished. In addition, a hardship is worked on the recipient who [*489] presents a successful case at the fair hearing. In planning a budget for limited resources, the recipient has to take into consideration that he or she may still be required to return the benefits which the DSS found were legally obtained. No reliance may be placed on the ruling of the DSS exonerating a person of fraud.

Finally, precluding the district attorney from relitigating the issue of respondent's welfare fraud would protect respondent from being harassed by repeated litigation. The County had an adequate opportunity at the fair hearing to prove that respondent had fraudulently obtained welfare benefits. However, respondent successfully demonstrated her innocence. To subject her to a second proceeding in which she must defend herself against the very same charges of misconduct would be manifestly unfair.

In addition to the public policy considerations discussed above, the uniqueness of the statutory scheme governing prosecutions for AFDC fraud and the circumstances of the individuals receiving welfare benefits make application of collateral estoppel particularly appropriate in this case. As this court recognized in *McGee*, the Legislature has apparently determined that since public assistance provides recipients with only the most minimal standard of living, recipients suspected of fraudulently obtaining benefits are entitled to some protection from criminal prosecution. (*People v. McGee, supra, 19 Cal.3d at pp. 963-965.)* Accordingly, the unique statutory scheme set up by the Legislature establishes a policy in favor of resolving AFDC fraud cases outside the criminal justice system. (*Ibid.*) The state must seek restitution by request or civil action before initiating criminal proceedings in cases involving certain categories of AFDC fraud. (§ 11483.) When a request for restitution results in a fair hearing determination by the DSS that no fraud has been committed, that decision should collaterally estop a criminal prosecution for the same charge. To hold otherwise, this court would have to ignore the safeguards afforded welfare recipients by the Legislature.

IV.

In the particular and special circumstances of this case, collateral estoppel bars the state from prosecuting respondent for welfare fraud since she was exonerated in a DSS hearing of that charge. The DSS was "acting in a judicial capacity and [resolving] disputed issues of fact properly before it which the parties . . . had an adequate opportunity to [*490] litigate." (*United States v. Utah Constr. Co., supra, 384 U.S. at p. 422 [16 L.Ed.2d at p. 661].)* Further, the traditional prerequisites and policy reasons for applying collateral estoppel have been met here. The application of collateral estoppel is also warranted in this particular setting due to the unique statutory scheme which established [**335] a preference for the noncriminal resolution of cases involving an accusation of welfare fraud.

Accordingly, the trial court's dismissal of the information against respondent is affirmed.

DISSENTBY:

KAUS

DISSENT:

KAUS, J. I respectfully dissent.

Although in many instances administrative rulings may properly be accorded binding effect in subsequent proceedings under collateral estoppel principles (see *Rest.2d Judgments, § 83*), I believe that the majority's application of the collateral estoppel doctrine in this case is seriously flawed in two respects, one relating to the facts of this particular case and the other pertaining more generally to the relationship between administrative fair hearing proceedings and criminal prosecutions. In may view, each error independently invalidates the majority's conclusion that the collateral estoppel doctrine bars the criminal prosecution here.

[***91] I

I turn first to the narrower issue. The majority's invocation of the collateral estoppel doctrine on the facts of this case ignores the black-letter precept that collateral estoppel, as contrasted with the bar or merger aspects of res judicata, is confined to issues *actually litigated* in the initial proceeding. As we stated in *Clark v. Lesher (1956) 46 Cal.2d 874, 880 [299 P.2d 865]:* "In its secondary aspect res judicata has a limited application to a second suit between the same parties, though based on a different cause of action. The prior judgment is not a complete bar, but it 'operates as an estoppel or conclusive adjudication as to such issues in the second action *as were actually litigated* and determined in the first action.' [Citation.] This aspect of the doctrine of res judicata, now commonly referred to as the doctrine of collateral estoppel, is confined to issues actually litigated." (Italics added.) (See [*491] generally 4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, § § 197, 201, pp. 3335, 3339-3341.) n1

n1 This element of the collateral estoppel -- or "issue preclusion" -- doctrine remains fully viable today. *Section 27 of the Restatement Second of Judgments*, published in early 1982, states: "When an issue of fact or law *is actually litigated* and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." (Italics added.) Comment (e) to section 27 explains the basic rationale of the "actually litigated" limitation: "*Issues not actually litigated.* A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. Or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation . . . ." (P. 256.)

The majority's statement of facts makes it clear, of course, that in this case the county did not "actually litigate" the question of defendant's fraud at the administrative fair hearing. As the majority acknowledges, at that hearing the county declined to present any evidence at all, taking the position that the agency lacked jurisdiction in light of the pending criminal proceedings. At the conclusion of the hearing, the hearing officer simply found -- predictably, in light of the county's inaction -- that the county had failed to meet its burden of proving that defendant had fraudulently obtained welfare benefits. n2

n2 The hearing officer's decision states in this regard: "Since the county has not established its case, or even attempted to present a case, it must be found that the county lacks authority or the right to adjust for alleged overpayment or demand repayment of the alleged overissuance of food stamps."

Since [**336] the county did not appeal the administrative decision, it is, of course, bound by the terms of that ruling. Thus, the county is obligated to refund any restitution payments defendant made pursuant to the agency's directions and to rescind its administrative "Notice of Action." At the same time, however, because the county did not "actually litigate" the fraud question in the administrative proceeding, the majority has simply disregarded the well-established contours of the collateral estoppel doctrine in holding that the People are precluded from proving defendant's guilt in this separate "cause of action" -- the criminal prosecution. [*492] On this basis alone, the majority's application of collateral estoppel is unquestionably erroneous. n3

n3 *Neither Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal.2d 601 [25 Cal.Rptr. 559, 375 P.2d 439],* nor *United States v. Utah Constr. Co. (1966) 384 U.S. 394 [16 L.Ed.2d 642, 86 S.Ct. 1545]* supports the majority's position. In *Teitelbaum Furs*, plaintiff's president had fully litigated the question of his guilt in the prior criminal proceeding, and our court simply held that under those circumstances the plaintiff corporation could not avoid the collateral estoppel effect of the earlier judgment by asserting that its president had not presented all of the relevant existing evidence at the first trial. Similarly, in *Utah Construction Co.*, the issue in dispute had been actually litigated in the earlier administrative proceeding, and the United States Supreme Court gave no indication whatsoever that collateral estoppel principles should be more

expansively applied to administrative determinations than to court decisions.

Insofar as the case of *Fitzgerald v. Herzer (1947) 78 Cal.App.2d 127, 132 [177 P.2d 364]* purports to hold that a default judgment invokes the "collateral estoppel" -- as opposed to the "merger" or "bar" -- aspect of res judicata, the decision is clearly contrary to this court's subsequent decision in *Clark v. Lesher, supra,* and the host of collateral estoppel decisions following *Clark.* As the commentary to *section 27 of the Restatement Second of Judgments* explains: "In the case of judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section [collateral estoppel or issue preclusion] does not apply with respect to any issue in a subsequent action." (*Rest.2d Judgments, § 27*, com. (e), p. 257.)

[***92] II

In addition, although it is not necessary to reach the question in this case, I think the majority's application of collateral estoppel would be improper even if the question of defendant's fraud had been actually litigated at the administrative fair hearing.

The majority concedes that it can cite no case in which an administrative determination has been held to bar a subsequent criminal prosecution. n4 In *People v. Demery (1980) 104 Cal.App.3d 548 [163 Cal.Rptr. 814],* perhaps the closest California case in point, the court held directly to the contrary, finding that an administrative determination by the State Board of Medical Quality Assurance which absolved the defendant doctor of a charge of improper furnishing of drugs (*Health & Saf. Code, § 11154*) did not operate as collateral estoppel in a subsequent criminal prosecution against the doctor on the same charges. In reaching this conclusion, the *Demery* court explained, inter alia, that "[the] objective of [the administrative] proceeding was policing licensing requirements rather than making a determination of [*493] criminal guilt or innocence. While administrative hearings employ fact-finding methods that are similar to those employed in criminal trials, the standards of admissibility differ and the objectives sought are not identical." *(104 Cal.App.3d at p. 561.)*

n4 Indeed, the majority has not even cited a single case in which a *civil judgment* against the government or a government agency has been found to preclude a subsequent criminal prosecution.

Contrary to the majority's suggestion, this reasoning is fully applicable to this case. Indeed, on brief reflection, it becomes evident that there are many administrative bodies which in the course of their ordinary duties frequently pass on factual disputes concerning conduct that may also be the subject of a criminal prosecution. Professional licensing boards, prison disciplinary panels, local school boards, the State Personnel Board, labor relations boards and the like may all have occasion to determine -- for their own specialized purposes -- whether [**337] or not an individual committed alleged misconduct. In granting an administrative body the authority to make this factual determination within a particular administrative context, the Legislature surely did not contemplate that the administrative decision would be routinely conclusive on the ultimate issue of an individual's guilt *or innocence* of criminal charges relating to the same factual incident. In this setting, as *Demery* recognizes, the significant differences in both the jurisdiction and the purposes of the administrative and criminal proceedings compel the conclusion that the administrative decision is not binding in a subsequent criminal prosecution. (Cf. *Rest.2d Judgments, § 28(3).*) n5

n5 The introduction of the Restatement Second of Judgments makes it clear that its provisions are not intended to apply directly to "res judicata in criminal proceedings, that is, [to] the effects of a prior criminal or civil judgment in a subsequent criminal prosecution." (P. 2.) The introduction nevertheless suggests that "the analysis of various problems considered herein may have application to cognate problems arising in criminal litigation." (*Id.*) In this light, the exception to the general collateral estoppel doctrine embodied in section 28(3) may shed some light on the issue before us. That section provides: "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . . (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them . . . ." (See also *Rest.2d Judgments, § 83(4)* ("An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that: . . . (b) The tribunal in which the issue subsequently

arises be free to make an independent determination of the issue in question.").)

[***93] Indeed, from a practical perspective, the majority's conclusion appears particularly unsound and short-sighted in the welfare fair hearing context. (See *Welf. & Inst. Code, § § 10950- 10965.*) The statutory [*494] scheme reveals that the fair hearing mechanism is intended to provide an aggrieved welfare recipient with a speedy (see *id.*, § 10952) and informal (see *id.*, § 10955) means to challenge an administrative action which may reduce or terminate vitally needed social service benefits. Judicial authorities have frequently observed that, as applied to this kind of administrative proceeding, "[collateral] estoppel is by no means an unmixed blessing" (*Kelly v. Trans. Globe Travel Bureau, Inc. (1976) 60 Cal.App.3d 195, 202 [131 Cal.Rptr. 488]);* if the decision at the fair hearing is given important -- indeed, potentially determinative -- consequences for an upcoming criminal prosecution, the entire atmosphere and manner of conduct of the fair hearing will be significantly changed, and the administrative hearing will be transformed, in effect, into the first stage of the criminal prosecution itself. To insure that the People's opportunity to prove the criminal charges is not lost, the county will be required to marshall all of the prosecution's potential witnesses and evidence at the administrative level; prehearing delays and lengthy hearings will be the predictable result. Furthermore, the majority's conclusion will have the unfortunate effect of requiring district attorney offices to allocate a greater proportion of their ever-decreasing resources to administrative matters, rather than reserving these scarce resources for the actual prosecution of serious criminal cases in court.

In contrast to the present majority opinion which takes no note of these practical considerations, our court in *In re Dennis B. (1976) 18 Cal.3d 687 [135 Cal.Rptr. 82, 557 P.2d 514]* gave full recognition to similar practical concerns in holding that the filing and adjudication of a routine traffic infraction should not operate, under *Penal Code section 654*, as a bar to the subsequent filing of misdemeanor or felony charges arising out of the same course of conduct. In *Dennis B.*, Justice Mosk, writing for a unanimous court, explained that "[the] state's substantial interest in maintaining the summary nature of minor motor vehicle proceedings would be impaired by requiring the prosecution to ascertain for each infraction [**338] the possibility of further criminal proceedings . . . ." *(18 Cal.3d at p. 695.)* Justice Mosk noted the various procedural innovations that had been implemented to further the interest in expedited proceedings, pointing in particular to "the use of highway patrol officers . . . to perform certain tasks for which deputy district or city attorneys are usually required," and concluded that "[this] type of flexibility benefits all parties: defendants gain a swift and inexpensive disposition of their cases without risk of major penalties; and the prosecution, the court system and ultimately the public benefit because judicial and law [*495] enforcement resources are freed to concentrate on serious criminal behavior." (*Ibid.*)

The similarities between *Dennis B.* and this case are evident: if the results of an administrative fair hearing are limited to the administrative context, the hearing can proceed in a speedy, informal manner with a social worker or comparable agency employee presenting the agency's case to the hearing officer. If, however, the "stakes" at the fair hearing are raised so that the administrative decision may be determinative of the pending criminal prosecution -- as the majority proposes -- then the fair hearing [***94] will inevitably become a full dress rehearsal for the criminal trial, and resources which should be allocated to the trial of serious criminal cases will be diverted into the administrative process.

III

In sum, I submit that the collateral estoppel doctrine is inapplicable in this case for two reasons: (1) the issue of defendant's guilt or innocence of welfare fraud was not "actually litigated" at the administrative fair hearing, and (2) even if it had been actually litigated, such an administrative determination should not be binding in a subsequent criminal prosecution.

I would reverse the judgment.